Update on Statute of Limitations Defenses and Affirmative Claims in Residential Mortgage Cases

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Outline

- Relevance of statute of limitations
- Discussion of NY CPLR § 213(4), the applicable statute of limitations for mortgages in New York
- Acceleration defined
- Re-setting the statute of limitations
- Tolling the statute of limitations
- Quieting title under NY RPAPL § 1501(4)
- Screening potential SOL cases and practice tips
- Questions

Relevance of Topic

- The foreclosure crisis began in 2007, over 10 years ago.
- There are some homeowners that defaulted years ago and are not in foreclosure (maybe they were in foreclosure previously).
- Other homeowners are in foreclosure now but the bank waited years before filing a foreclosure action.
- Another group of homeowners is currently in foreclosure but these cases might be dismissed or voluntarily discontinued by the bank in the future.

Relevance of Topic

- Many homeowners were victims of predatory lending and/or defaulted on their mortgage because of serious hardships.
- Delay by banks in filing foreclosure actions has caused real harm to homeowners:
  - Homeowners live in a state of uncertainty
  - Interest and fees continue to accrue, often at a high rate
  - Homeowners' credit scores are damaged, preventing them from getting back on track

The Statute of Limitations for Mortgages in New York

"The following actions must be commenced within **six years**: . . . an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein."

NY CPLR § 213(4).

When the Statute of Limitations Begins Running

The six-year statute of limitations begins to run:

- from the due date for *each* unpaid installment; or
- the time the mortgagee is entitled to demand full payment; or
- when the mortgage has been *accelerated* by a proper demand; or
- when a foreclosure action is brought.

See, e.g., Saini v. Cinelli Enterprises Inc., 289 A.D.2d 770, 771, 733 N.Y.S.2d 824, 826 (3d Dep't 2001).

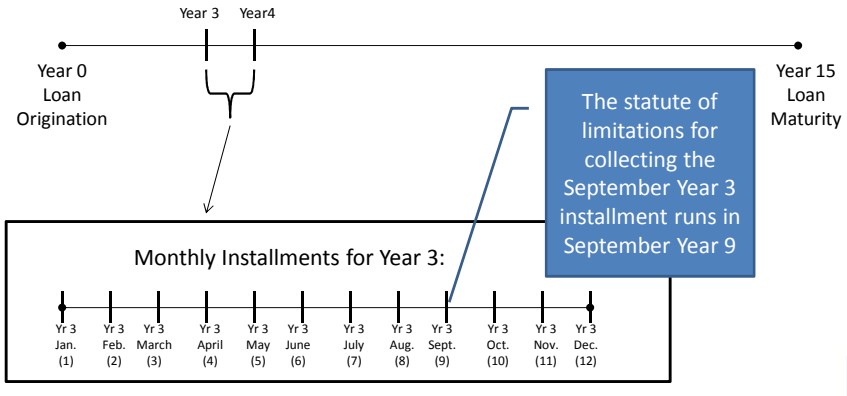
When the Statute Begins Running on Installment Payments

"[F]or any mortgage payable in installments, there are **separate causes of action for each installment accrued**, and the Statute of Limitations begins to run, on the date each installment becomes due."

Loiacono v. Goldberg, 240 A.D.2d 476, 477, 658 N.Y.S.2d 138 (2d Dep't 1997).

When the Statute Begins Running on Installment Payments

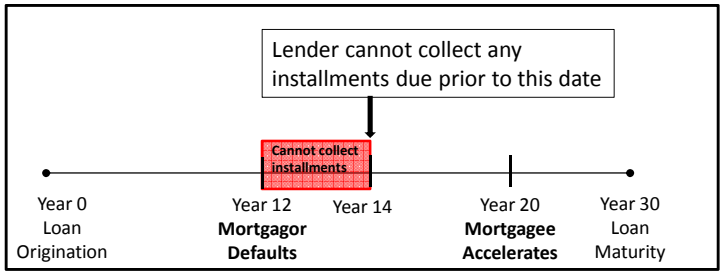
For most mortgages, the installments (i.e., mortgage payments) come due each month.



When the Statute Begins Running on Installment Payments

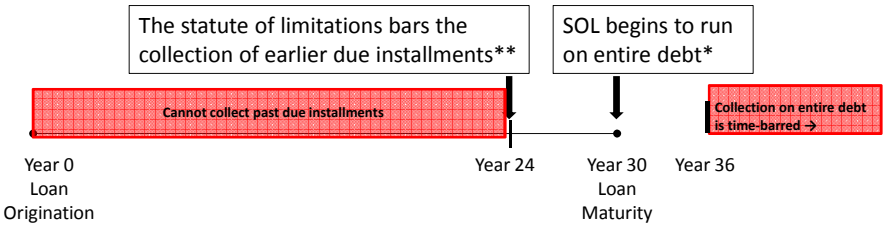
Where the entire mortgage has not yet come due, a lender will be barred from collecting principal and interest payments that accrued more than six years prior to acceleration or the commencement of the foreclosure action.

See, e.g., Wells Fargo Bank, N.A. v. Cohen, 80 A.D.3d 753, 754, 915 N.Y.S.2d 569, 571 (2d Dep't 2010); *Khoury v. Alger*, 174 A.D.2d 918, 919, 571 N.Y.S.2d 829 (3rd Dep't 1991).



When the Statute Begins Running on the Entire Mortgage Debt

The statute of limitations begins to run on the entire debt* upon the loan's maturity. *See Quackenbush v. Mapes*, 123 A.D. 242, 107 N.Y.S. 1047 (1st Dep't 1908).

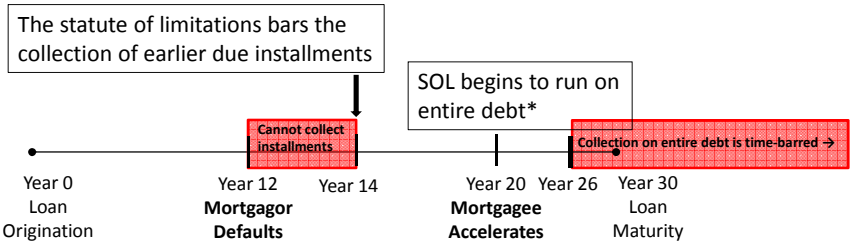


* Included in "entire debt" is the unpaid principal balance and installments that came due within the past six years.
**This assumes that the loan has not been already accelerated.

When the Statute Begins Running on the Entire Mortgage Debt

The statute of limitations begins to run on the entire debt* "**[o]nce the mortgage debt is accelerated**."

Loiacono v. Goldberg, 240 A.D.2d 476, 477, 658 N.Y.S.2d 138 (2d Dep't 1997).



* Included in "entire debt" is the unpaid principal balance and installments that came due within past six years.

When the Statute Begins Running on the Entire Mortgage Debt

The statute of limitations for **reverse mortgages** begins to run <u>when the triggering event occurs.</u>

> "Defendant established that, pursuant to the mortgage agreement, 'the principal sum and interest shall become due upon,' inter alia, the death of the mortgagor, i.e., decedent, which occurred on May 12, 2006, and that defendant received a notice of default and demand for payment sent from a nonparty that serviced the mortgage on June 29, 2006. '[T]he statute of limitations . . . was triggered when the party that was owed money had the right to demand payment, not when it actually made the demand' (*Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 771 [2012])."

Wendover Fin. Servs. v. Ridgeway, 137 A.D.3d 1718, 1719, 28 N.Y.S.3d 535 (4th Dep't 2016).

When the Statute Begins Running on the Entire Mortgage Debt

Some courts have held that *even without acceleration*, a lender is barred from foreclosing more than six years after default.

See, *e.g.*, *Corrado v. Petrone*, 139 A.D.2d 483, 484-85, 526 N.Y.S.2d 845 (2d Dep't 1988); *Phalen-Sobolevsky v. Mullin*, 26 A.D.3d 806, 811 N.Y.S.2d 506 (4th Dep't 2006); *LePore v. Shaheen*, 32 A.D.3d 1330, 821 N.Y.S.2d 532 (4th Dep't 2006).

(Note: It is unclear whether any of the mortgages in these cases were payable as installment contracts. These decisions seem to be outliers and should not be relied on in evaluating whether a foreclosure action is time-barred.)

What Constitutes Acceleration?

"An election to accelerate the mortgage must consist of a notice of election to the mortgagor **or** some overt act manifesting such an election."

Goldman Sachs Mortgage Co. v. Mares, 45 Misc. 3d 1218(A) (Sup. Ct. Tompkins Cty. 2014) *aff'd*, 135 A.D.3d 1121, 23 N.Y.S.3d 444 (3rd Dep't 2016) (citing *446 W. 44th St. v. Riverland Holding Corp.*, 267 A.D. 135, 137, 44 N.Y.S.2d 766 (1st Dep't 1943)) (emphasis added) (the default letter, which demanded only the amounts then due or to become due and indicated that failure to pay the total amount past due *may* result in acceleration of the sums secured by the mortgage, did not constitute a clear and unequivocal acceleration of the entire mortgage debt).

And it must be "clear and unequivocal."

Sarva v. Chakravorty, 34 A.D.3d 438, 439, 826 N.Y.S.2d 74 (2d Dep't 2006) (the record failed to establish that the loan had been accelerated prior to the commencement of the action because a letter which expressed the mortgagee's desire "to get paid in full" was omitted from the record).

What Constitutes Acceleration?

- Default notice from lender may constitute acceleration

  "The letters from plaintiff's predecessor-in-interest provided clear and unequivocal notice that it 'will' accelerate the loan balance and proceed with a foreclosure sale, unless the borrower cured his defaults within 30 days of the letter. When the borrower did not cure his defaults within 30 days, all sums became immediately due and payable. . . . At that point, the statute of limitations began to run on the entire mortgage debt."

  Deutsche Bank Nat'l Trust Co. v. Royal Blue Realty Holdings, Inc., 148 A.D.3d 529, 530, 48 N.Y.S.3d 597 (1st Dep't 2017).

Bank of America

Home Loans
P.O. Box 660694
Dallas, TX 75266-0694

Send Payments to:
P.O. Box 15222
Wilmington, DE 19886-5222

July 12, 2011

[redacted]

Account No: [redacted]
Premises: [redacted]

NOTICE OF INTENT TO ACCELERATE

Dear [redacted]

Bank of America, N.A. (hereinafter "Bank of America, N.A.") services the home loan described above on behalf of the holder of the promissory note (the "Noteholder"). The loan is in serious default because the required payments have not been made. The total amount now required to reinstate the loan as of the date of this letter is as follows:

Monthly Charges:	06/01/2011	$3,063.38
Late Charges:	06/01/2011	$30.63
Other Charges:	Uncollected Late Charges:	$61.26
	Uncollected Costs:	$0.00
	Partial Payment Balance:	($0.00)
	TOTAL DUE:	**$3,155.27**

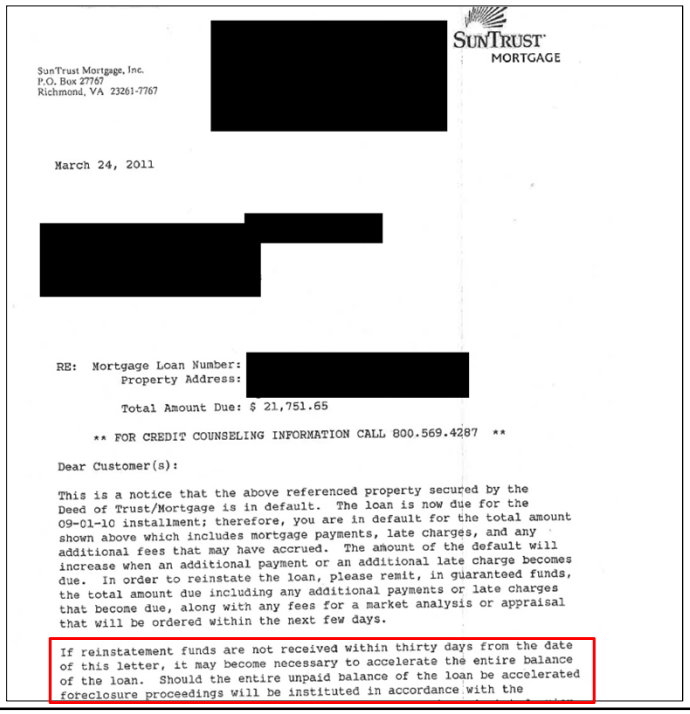
You have the right to cure the default. To cure the default, on or before August 16, 2011, Bank of America, N.A. must receive the amount of $3,155.27 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before August 16, 2011.

The default will not be considered cured unless Bank of America, N.A. receives "good funds" in the amount of $3,155.27 on or before August 16, 2011. If any check (or other payment) is returned to us for insufficient funds or for any other reason, "good funds" will not have been received and the default will not have been cured. No extension of time to cure will be granted due to a returned payment. Bank of America, N.A. reserves the right to accept or reject a partial payment of the total amount due without waiving any of its rights herein or otherwise. For example, if less than the full amount that is due is sent to us, we can keep the payment and apply it to the debt but still proceed to foreclosure since the default would not have been cured.

If the default is not cured on or before August 16, 2011, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property. If your property is foreclosed upon, the Noteholder may pursue a deficiency judgment against you to collect the balance of your loan, if permitted by law.

What Constitutes Acceleration?

- Notice of *intent* to accelerate is not acceleration if notice of default "was nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's option acceleration clause." *21st Mortg. Corp. v. Adames*, 153 A.D.3d 474, 474, 60 N.Y.S.3d 198 (2d Dep't 2017).



SunTrust Mortgage, Inc.
P.O. Box 27767
Richmond, VA 23261-7767

[redacted]

SUNTRUST MORTGAGE

March 24, 2011

[redacted]

RE: Mortgage Loan Number: [redacted]
Property Address:

Total Amount Due: $ 21,751.65

** FOR CREDIT COUNSELING INFORMATION CALL 800.569.4287 **

Dear Customer(s):

This is a notice that the above referenced property secured by the Deed of Trust/Mortgage is in default. The loan is now due for the 09-01-10 installment; therefore, you are in default for the total amount shown above which includes mortgage payments, late charges, and any additional fees that may have accrued. The amount of the default will increase when an additional payment or an additional late charge becomes due. In order to reinstate the loan, please remit, in guaranteed funds, the total amount due including any additional payments or late charges that become due, along with any fees for a market analysis or appraisal that will be ordered within the next few days.

If reinstatement funds are not received within thirty days from the date of this letter, it may become necessary to accelerate the entire balance of the loan. Should the entire unpaid balance of the loan be accelerated foreclosure proceedings will be instituted in accordance with the

What Constitutes Acceleration?

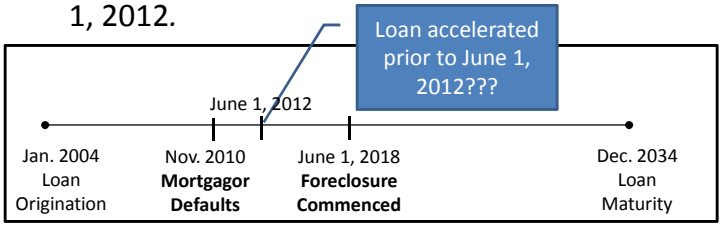
- Commencement of a foreclosure action
  - The foreclosure complaint will generally allege either that plaintiff accelerates and calls the entire debt due by the very commencement of the foreclosure, or identify an earlier acceleration point based on the mortgagee's election.
  - "Here, [Predecessor-in-interest] commenced an action to foreclose the subject mortgage, which was unquestionably notice of the intent to accelerate." *Arbisser v. Gelbelman*, 286 A.D.2d 693, 694, 730 N.Y.S.2d 157 (2d Dep't 2001).

What Constitutes Acceleration?

- Acceleration by a predecessor-in-interest constitutes valid acceleration as long as the predecessor-in-interest properly accelerated the mortgage and had standing to do so.
  - *EMC Mortg. Corp. v. Smith*, 18 A.D.3d 602, 603, 796 N.Y.S.2d 364 (2d Dep't 2005) ("the statute of limitations began to run when the plaintiff's predecessor-in-interest . . . elected to accelerate the subject mortgage.").

Illustrating the Effect of Acceleration

- **Homeowner defaults on loan on November 1, 2010**
- **Lender brings foreclosure action on June 1, 2018**
  - If the loan was accelerated prior to June 1, 2012, the action is time-barred and should be dismissed with prejudice; but
  - If the loan is accelerated only upon the commencement of the foreclosure action, the lender is barred *only* from collecting principal & interest payments due before June 1, 2012.



Ineffective Accelerations

Courts have rejected the statute of limitations defense upon a finding that the lender's purported acceleration was ineffective and therefore failed to start the clock running.

Ineffective Accelerations

- Mortgage **not accelerated** by prior foreclosure action where that prior case was dismissed for lack of standing.
  - *U.S. Bank Natl. Assn. v. Gordon*, 158 A.D.3d 832, 72 N.Y.S.3d 156 (2d Dep't 2018) ("Here, however, it had already been determined that the prior plaintiff in the 2007 action did not have standing to commence that action because it was not the holder of the note and mortgage at the time that the 2007 action was commenced. Accordingly, service of the 2007 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt, since the prior plaintiff did not have the authority to accelerate the debt or to sue to foreclose at that time.")
  - *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 943 N.Y.S.2d 540 (2d Dep't 2012) ("[S]ervice of the 2002 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt since the [bank] did not have the authority to accelerate the debt or to sue to foreclose at that time.")
  - *EMC Mortgage Corp. v. Suarez*, 49 A.D.3d 592, 593, 852 N.Y.S.2d 791 (2d Dep't 2008) ("[T]he purported acceleration was a nullity and the six-year statute of limitations, which ordinarily would commence running on the date of acceleration, did not begin to run on the entire debt at that time." (citations omitted))
    - Court also noted that "recovery is limited to only those unpaid installments which accrued within the six-year period immediately preceding its commencement of this action." *Id.*

Ineffective Accelerations

Some courts consider whether the plaintiff in prior action lacked standing, even when the prior case was not dismissed for lack of standing.

In *Deutsche Bank National Trust Company v. Bernal*, 56 Misc. 3d 915, 59 N.Y.S.3d 267 (Sup. Ct. Westchester Cty. 2017) (Scheinkman, J.), the plaintiff argued that its 2015 action was not time barred because its predecessor-in-interest lacked standing when it commenced a 2009 action which had been dismissed for lack of prosecution. Court entertained this argument but ultimately rejected it because "plaintiff has failed to show that [its predecessor] lacked standing to accelerate the debt by the filing of the 2009 complaint."

Can Acceleration Be Revoked?

If the mortgagor has changed its position based on the acceleration, the mortgagee can't revoke:

- "The election made by [lender] at that time to treat the mortgage debt as due became final and irrevocable after [borrower]'s change of position and assumption of legal obligations, the direct result of that election."

  Kilpatrick v. Germania Life Ins. Co., 183 N.Y. 163, 168, 75 N.E. 1124 (1905).

Can Acceleration Be Revoked?

"A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action."

NMNT Realty Corp. v. Knoxville 2012 Trust, 151 A.D.3d 1068, 1069-70, 58 N.Y.S.3d 118 (2d Dep't 2017) (*citing EMC Mortg. Corp. v. Patella*, 279 A.D.2d 604, 606, 720 N.Y.S.2d 161 (2d Dep't 2001)).

Can Acceleration Be Revoked?

To be valid, revocation must "occur[] within the statute of limitations period."

> *Lavin v. Elmakiss*, 302 A.D.2d 638, 639, 754 N.Y.S.2d 741 (3rd Dep't 2003)(*citing EMC Mortgage Corp. v. Patella*, 279 A.D.2d 604, 605-606, 720 N.Y.S.2d 161 (2d Dep't 2001)); *Fed. Nat'l Mortgage Ass'n v. Mebane*, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88 (2d Dep't 1994)) (emphasis added).

What Is NOT Revocation?

- Dismissal of a foreclosure action by the court
  - *Fed. Nat'l Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88 (2d Dep't 1994).
- Acceptance of partial payments after acceleration
  - "[T]he mere acceptance of a partial payment of the accelerated debt by the previous holder of the subject note was not an affirmative act revoking the acceleration and thereby halting the running of the statute of limitations." *UMLIC VP, LLC v. Mellace*, 19 A.D.3d 684, 684, 799 N.Y.S.2d 61 (2d Dep't 2005).
  - *Lavin v. Elmakiss*, 302 A.D.2d 638, 639, 754 N.Y.S. 2d 741 (3d Dep't 2003).
- Service of a 90 day notice under RPAPL 1304
  - *Deutsche Bank Nat'l Trust Co. v. Adrian*, 157 A.D.3d 934, 935-36, 69 N.Y.S.3d 706 (2d Dep't 2018).

A Voluntary Discontinuance *May* Be Deemed Revocation (Pt. 1)

- *NMNT Realty Corp v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1070, 58 N.Y.S.3d 118 (2d Dep't 2017).
  - Finding "triable issue of fact as to whether [plaintiff in prior foreclosure action]'s motion 'constituted an affirmative act by the lender to revoke its election to accelerate.'"
- *Nationstar v. Cobb*, Index No 504154/2014 (Sup. Ct. Kings Cty. Apr. 24, 2018) (Dear, J.).
  - Determination as to whether discontinuance is revocation "is properly made on a case-by-case basis seemingly by examining whether the conduct of the plaintiff therein would lead a fact-finder to conclude that the loan was restored to being an installment contract. . . . The subsequent correspondence produced by Plaintiff reflects that it was demanding only the past due portion of the loan (as would be the case if the loan were de-accelerated) rather than the entirety (as would have been the case if there were still an acceleration.)"

A Voluntary Discontinuance *May* Be Deemed Revocation (Pt. 1)

- *Deutsche Bank Natl. Tr. Co. v. Lee*, 70 N.Y.S.3d 791, 2018 N.Y. Slip Op. 28033 (Sup. Ct. Westchester Cty. Jan. 29, 2018) (Ecker, J.).
  - "[A] pre-answer voluntary discontinuance, without court action, done within the statute of limitations, constitutes a revocation of acceleration."
- *U.S. Bank N.A. v. Wongsonadi*, 55 Misc.3d 1207(A), 55 N.Y.S.3d 695 (Table) (Sup. Ct. Queens Cty. 2017) (McDonald, J.).
  - "The election to accelerate contained in the complaint was nullified when plaintiff voluntarily discontinued the prior action."
- *4 Cosgrove 950 Corp. v. Deutsche Bank Nat. Trust Co.,* 2016 WL 2839341 , at *2, 2016 N.Y. Slip Op. 32854(U), at *3 (Sup. Ct. N.Y. Cty. 2016) (Mendez, J.).
  - "Withdrawing the prior foreclosure action is an affirmative act of revocation."

A Voluntary Discontinuance *May* Be Deemed Revocation (Pt. 2)

- *HSBC Bank USA v. Kirschenbaum*, 159 A.D.3d 506, 73 N.Y.S.3d 41 (1st Dep't 2018).
  - "Plaintiff's argument that the mortgage loan was de-accelerated when it moved to discontinue the first mortgage foreclosure proceeding is improperly raised for the first time on appeal . . . . In any event, the argument is unavailing."
- *U.S. Bank, N.A. v. Leone*, Index No 711131/2016 (Sup. Ct. Queens Cty. Dec. 11, 2017) (Kerrigan, J.).
  - Plaintiff's "motion to discontinue the prior action, in and of itself, did not constitute an affirmative act of revocation of its acceleration of the loan. . . . In order to . . . 'de-accelerate' [the loan] plaintiff must not only, as a matter of course, discontinue its foreclosure action . . . but must also reinstate the mortgage, which includes the payment of the loan in the installments of principal and interest set forth in the mortgage."
- *U.S. Bank, N.A. v. Navarro*, Index No 702449/2016 (Sup. Ct. Queens Cty. Jan. 10, 2018) (Velasquez, J.).
  - "[T]he plaintiff never affirmatively revoked its acceleration of the debt . . . [where it] commenced the second foreclosure action on May 17, 2012, one month before it made the motion to discontinue. . . . Therefore, even assuming *arguendo* that the discontinuance constitutes a de-acceleration of the debt, such act would be meaningless in view of the commencement of the second action."

"De-acceleration" Letters

Dear [redacted]:

As you are aware, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, is the holder of the above-referenced mortgage loan. Under the terms of the above-referenced Mortgage or Deed of Trust ("Security Instrument") securing your Loan, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, hereby notifies you of the following:

1. Previously, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3 accelerated the maturity of the Loan and declared all sums secured by the Security Instrument immediately due and payable. US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, hereby de-accelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the Loan as an installment loan.
2. You are still in default because you have failed to pay the required monthly installments commencing with the payment due March 1, 2008
3. Wells Fargo Bank, N.A. has a variety of homeowners' assistance programs that might help you resolve your default and keep your home; however, we need to talk with you to discuss these options and determine which of them might be appropriate for your circumstances. Please call us as soon as possible at 1-800-678-7986.

"De-Acceleration" Letters

Soroush v. Citimortgage, Inc., 161 A.D.3d 1124, __ N.Y.S. 3d __, 2018 N.Y. Slip Op. 03724 (2d Dep't 2018)

Question of fact as to whether putative revocation letter proffered by lender actually preceded the expiration of limitations period because "nothing on the face of the letter establishes when it was actually mailed, and no independent evidence of the mailing date was submitted."

"De-Acceleration" Letters

Citimortgage, Inc. v. Ramirez, 59 Misc.3d 1212(A), *3, 2018 N.Y. Slip Op. 50525(U) (Sup. Ct. Schenectady Cty. Apr. 5, 2018) (Versaci J.).

5 prong test to determine if lender successfully revokes acceleration:

- 1) the revocation must be evidenced by an affirmative act;
- 2)the affirmative act must be clear and unequivocal;
- 3) the affirmative act must give actual notice to the borrower that the acceleration has been revoked;
- 4) the affirmative act must occur before the expiration of the six (6)-year statute of limitations period; and
- 5) the borrower must not have changed his or her position in reliance on the acceleration.

Resetting the Limitations Period: NY GOL § 17-105 (1)

"A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise. If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified."

N.Y. General Obligations Law § 17-105 (1).

Resetting the Limitations Period: NY GOL § 17-105 (1)

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N.Y. General Obligations Law § 17-105 (1).

Resetting the Limitations Period: NY GOL § 17-105 (1)

- A
  - waiver of the expiration of the time limited for commencement of an action to foreclose, or
  - promise to pay the mortgage debt,
- if made after the accrual of a right of action to foreclose the mortgage
- and made by the express terms of a writing signed by the party to be charged
- is effective to make the time limited for commencement of the action run from the date of the waiver or promise.

N.Y. General Obligations Law § 17-105 (1).

Resetting the Limitations Period: NY GOL § 17-105 (1)

- In other words, a borrower can contractually agree to reset the statute of limitations period or adjust the remaining limitations period.
- To be valid, the waiver/ adjustment must be:
  (1) Express;
  (2) In writing; and
  (3) Signed by the party waiving the defense/ adjusting the limitations period.
- If the waiver is valid, the statute of limitations will reset from the date of the waiver or promise, unless otherwise specified.
- A promise to pay the mortgage debt, if express, in writing and signed by the mortgagor, will also reset the statute of limitations period, subject to any conditions expressed in the writing.

Resetting the Limitations Period: NY GOL § 17-105 (1)

- In order for a promise to pay to restart the limitations period, it must be an "express promise to pay the mortgage debt *per se*," or an "express acknowledgment of the indebtedness."
  Petito v. Piffath, 85 N.Y.2d 1, 8, 647 N.E.3d 732 (1994).
- In order for a payment to restart the limitations period, it must be "accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder."
  Saini v. Cinelli Enters. Inc., 289 A.D.2d 770, 772, 733 N.Y.S.2d 824, 827 (3rd Dep't 2001).
  - "[B]ecause the plaintiff asserts that the payment was made as a condition to receiving an extension of a bankruptcy stay, the payment did not constitute an unqualified acknowledgement of the debt or manifest a promise to pay the remainder."
    U.S. Bank Nat. Ass'n v. Martin, 144 A.D.3d 891, 893, 41 N.Y.S.3d 500 (2d Dep't 2016).

Resetting the Limitations Period: NY GOL § 17-105 (1)

- Payments made through a bankruptcy plan might re-set the statute of limitations.
  - *Albin v. Dallacqua*, 254 A.D.2d 444, 445, 679 N.Y.S.2d 402, 402, 1998 N.Y. Slip Op. 09319 (2d Dep't 1998).
    Borrower's bankruptcy plan satisfied the criteria of General Obligations Law § 17-105 (1) to extend the Statute of Limitations where the borrower's "promise in the bankruptcy plan to pay the mortgage at issue was made after the accrual of a right of action to foreclose on the mortgage, was express, and was in a writing signed by the plaintiff."
  - *The Bank of New York Mellon v. Wiggins*, 2015 WL 9273426, at *2, 2015 NY Slip Op 32359(U), at *5 (Sup. Ct. N.Y. Cty. 2015) (J. Weiss).
    "Contrary to the defendant's claim, this action is timely inasmuch as the defendant's Bankruptcy filing in which she acknowledged the mortgage debt and negotiated a mitigation plan and made payments on the mortgage pursuant to the bankruptcy plan was sufficient to extend the statute of limitations (see General Obligations Law § 17-105 (1); *Nat'l Loan Inv'rs, L.P. v. Piscitello*, 21 A.D.3d 537, 538 (2d Dep't 2005); *Albin v. Dallacqua*, 254 A.D.2d 444 (2d Dep't 1998))."

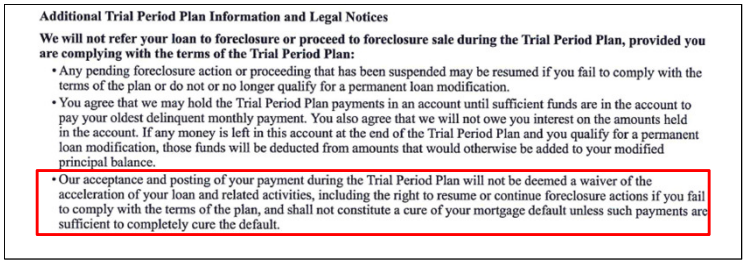
Resetting the Limitations Period: NY GOL § 17-105 (1)

- Not effective if the lender rejects the promise to pay.

  See Albin v. Pearson, 266 A.D.2d 487, 698 N.Y.S.2d 732 (2d Dep't 1999) (affirming judgment cancelling and discharging mortgages and finding that the mortgagor's bankruptcy plan, which provided that the mortgagor make payments on the mortgages, did not constitute a promise to pay the mortgage debt within the meaning of NY General Obligations Law § 17-105 (1) and thus did not extend the statute of limitations because the mortgagee rejected the plan).

Resetting the Limitations Period: NY GOL § 17-105 (1)

- The typical forbearance agreement or trial modification offer will not re-set the limitations period.
  - "[T]he purported loan modification application submitted by the plaintiff in opposition to the motion was not an acknowledgement of the debt and an unconditional promise to repay the debt sufficient to reset the running of the statute of limitations." *U.S. Bank N.A. v. Kess*, 159 A.D.3d 767, 768, 71 N.Y.S.3d 635 (2d Dep't 2018).



Additional Trial Period Plan Information and Legal Notices

We will not refer your loan to foreclosure or proceed to foreclosure sale during the Trial Period Plan, provided you are complying with the terms of the Trial Period Plan:

- Any pending foreclosure action or proceeding that has been suspended may be resumed if you fail to comply with the terms of the plan or do not or no longer qualify for a permanent loan modification.
- You agree that we may hold the Trial Period Plan payments in an account until sufficient funds are in the account to pay your oldest delinquent monthly payment. You also agree that we will not owe you interest on the amounts held in the account. If any money is left in this account at the end of the Trial Period Plan and you qualify for a permanent loan modification, those funds will be deducted from amounts that would otherwise be added to your modified principal balance.
- Our acceptance and posting of your payment during the Trial Period Plan will not be deemed a waiver of the acceleration of your loan and related activities, including the right to resume or continue foreclosure actions if you fail to comply with the terms of the plan, and shall not constitute a cure of your mortgage default unless such payments are sufficient to completely cure the default.

Tolling the Statute of Limitations

"Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced."

N.Y. C.P.L.R. § 204(a)

- *See In re Strawbridge*, No. 11 Civ. 6759 PAE, 2012 WL 701031, at *9-10 (S.D.N.Y. Mar. 6, 2012) (even though approximately 11 years had passed since the lender accelerated the mortgage, the statute of limitations had been tolled for all but 2 of those years because of numerous bankruptcy and state court stays).

Tolling the Statute of Limitations

- Bankruptcy may toll the statute of limitations when the automatic stay actually prevents a lender from commencing an action.
  - "Plaintiff does not benefit of any tolling of the statute of limitation period under CPLR § 204 (a) because Defendant's Chapter 13 Bankruptcy filing did not stay Plaintiff's ability to commence an action. Indeed, Plaintiff had already commenced the action on October 4, 2007, whereas Defendant filed for Bankruptcy protection in April, 2009." *Beneficial Homeowner Service Corp. v. Tovar*, Index No. 61092/2014 at *3, 2014 WL 8770905, (Sup. Ct. Suffolk Cty. Dec. 22, 2014), *aff'd*, 150 A.D.3d 657, 55 N.Y.S.3d 59 (2d Dep't 2017) .
  - *But see Lubonty v. U.S. Bank, N.A.*, 159 A.D.3d 962 , 964, 74 N.Y.S.3d 279 (2d Dep't 2018). "Pursuant to CPLR 204(a), the Bankruptcy Code's automatic stay tolls the limitations period for foreclosure actions." Court also held that "[t]he [borrower]'s contention that CPLR 204(a) does not apply here because the earlier foreclosure actions had already been commenced when the petitions in bankruptcy were filed is without merit."

Tolling the Statute of Limitations

- Effect of the automatic stay in bankruptcy on tolling:
  - *Saini v. Cinelli Enterprises Inc.*, 289 A.D.2d 770, 772, 733 N.Y.S.2d 824 (3d Dep't 2001) (bankruptcy filing did not renew nor toll statute of limitations because the first action had been discontinued prior to the bankruptcy and the bankruptcy petition was dismissed long before the second foreclosure action was commenced).
  - *Mercury Capital Corp. v. Shepherds Beach, Inc.*, 281 A.D.2d 604, 605, 733 N.Y.S.2d 48 (2d Dep't 2001) (the bankruptcy stay only tolled the statute of limitations from the filing of the bankruptcy petition to the confirmation of the chapter 11 plan, a period of 1 year and 4 months and the plaintiff waited 7 years and 7 months to commence the foreclosure action).

NY GOL § 17-105 (1) and Chapter 13

If a lender accelerates a mortgage debt, the consequent running of the time period may be tolled if the homeowner subsequently files for bankruptcy protection, and therein acknowledges the debt and promises to pay within a set time pursuant to a Chapter 13 plan. *See Nat'l Loan Investors, L.P. v. Piscitello*, 21 A.D.3d 537, 801 N.Y.S.2d 331 (2d Dep't 2005).

- ☞ Unless the lender rejects the plan! (*Albin v. Pearson*)

- *See also PSP-NC, LLC v. Raudkivi*, 138 A.D.3d 709, 29 N.Y.S.3d 51 (2d Dep't 2016) (borrower acknowledged the mortgage debt in his Chapter 13 bankruptcy plan and promised to repay it, which renewed the limitations period and the automatic bankruptcy stay tolled the renewed limitations period).

Tolling the Statute of Limitations

- Tolling pursuant to CPLR § 204(a) is narrowly construed.
  - *U.S. Bank N.A. v. Joseph*, 159 A.D.3d 968, 73 N.Y.S.3d 238 (2d Dep't 2018) (A temporary restraining order in prior foreclosure action "prevented the plaintiff from selling the property at auction, but only in the context of the first foreclosure action. The temporary restraining order did not prevent the plaintiff from discontinuing the first foreclosure action and commencing a new action. Thus, the plaintiff was not entitled under CPLR 204(a) to have the time during which the temporary restraining order was in effect excluded from the statute of limitations.")

Tolling the Statute of Limitations

- CPLR § 210(b) tolls the statute of limitations for eighteen months after the death of a potential defendant for the plaintiff to sue the administrator or executor of the estate.

- "The statute plainly is limited in scope to the executor or administrator of the decedent's estate and does not extend to other defendants in the same action. Consequently, CPLR 210(b) could not extend the statute of limitations period as to [surviving spouse] individually." *U.S. Bank N.A. v. Kess*, 159 A.D.3d 767, 768, 71 N.Y.S.3d 635 (2d Dep't 2018).

Tolling the Statute of Limitations

- In *Costa v. Deutsche Bank Natl. Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1*, the Court declined to adopt a number of novel tolling arguments, including:
  - Court rejected argument that statute of limitations was tolled by operation of RPAPL 1301, which merely provides for election of remedies but did not prohibit bringing a foreclosure action;
  - Court rejected argument that CPLR 3408 settlement conferences or submission of HAMP applications tolled statute of limitations, finding no support for such argument; and
  - Court rejected argument that RESPA Regulation X provisions tolled statute of limitations (Regulation X loss mitigation provisions were not yet effective and, in any event, no authority supported proposition that it was a statutory prohibition pursuant to CPLR 204(a) that would toll running of statute of limitations).

Costa v. Deutsche Bank Natl. Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1, 247 F. Supp. 3d 329, 345–46 (S.D.N.Y. 2017), a*ppeal withdrawn sub nom. Costa v. Deutsche Bank Natl. Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1, Mortg. Pass-Through Certificates, Series 2006-OA1*, 17-928, 2017 WL 4574795 (2d Cir. July 12, 2017).

Does Mailing a 90-Day Notice Toll the Statute of Limitations?

Lenders may argue that there is a split between the Appellate Departments as to whether service of a 90 day notice under RPAPL § 1304 tolls the limitations period.

Spoiler alert: they're wrong.

Does Mailing a 90-Day Notice Toll the Statute of Limitations? (No)

- *HSBC Bank USA v Kirschenbaum*, 159 A.D.3d 506, 506–07, 73 N.Y.S.3d 41 (1st Dep't 2018).

  "We reject plaintiff's argument that the 90–day notice under [RPAPL] § 1304 tolled the statute of limitations for 90 days. CPLR 204(a) authorizes tolling of a statute of limitations and provides that '[w]here the commencement of an action has been stayed by a court or by a statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.' Proper service of the RPAPL 1304 notice is a condition precedent to the commencement of a foreclosure action. A statutory prohibition and a condition precedent are separate concepts, and a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent. Here, plaintiff had complete control over when to serve the RPAPL 1304 notice, and could have done so at least 90 days prior to the expiration of the statute of limitations. Plaintiff did not serve the notice until May 26, 2015, less than 90 days before the expiration of the statute of limitations. In addition, there is nothing in RPAPL 1302 or 1304 that proscribes the prosecution of the action." (internal citations omitted).

Does Mailing a 90-Day Notice Toll the Statute of Limitations? (No)

- *Deutsche Bank Natl. Tr. Co. v. Adrian*, 157 A.D.3d 934, 935-36, 69 N.Y.S.3d 706, 708 (2d Dep't 2018).

  "[T]he plaintiff failed to raise a triable issue of fact as to whether it affirmatively revoked its election to accelerate the mortgage debt within the six-year limitations period (see *JBR Constr. Corp. v. Staples*, 71 A.D.3d 952, 953, 897 N.Y.S.2d 223 (2d Dep't 2010)). The plaintiff voluntarily discontinued the prior foreclosure action on April 23, 2014, after the statute of limitations had expired, and it failed to demonstrate that its April 8, 2014, 90–day notice, as a matter of law, 'destroy[ed] the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt' (*Beneficial Homeowner Serv. Corp. v Tovar*, 150 A.D.3d 657, 658, 55 N.Y.S.3d 59 (2d Dep't 2017))."

Does Mailing a 90-Day Notice Toll the Statute of Limitations? (No)

- *Wilmington Sav. Fund Soc'y, F.S.B. v. Gustafson*, 160 A.D.3d 1409, 1410 (4th Dep't 2018).
  - Altering the text of *EMC Mtge. Corp. v. Suarez* to add bracket section "Although this mortgage foreclosure action therefore is not time-barred, we note that 'in the event that the plaintiff prevails in this action, its recovery is limited to only those unpaid installments which accrued within the six-year [**and 90-day**] period immediately preceding its commencement of this action' (*EMC Mtge. Corp.*, 49 A.D.3d at 593; *see* RPAPL 1304; CPLR 204(a)."
  - BUT, the *Gustafson* Court held that the action was not time-barred because the prior actions were commenced by an entity that lacked standing, so there had been no acceleration. The court was not asked whether the SOL had been tolled, by service of a 90-day notice or otherwise.

Tolling Between Dismissal of First Action and Filing of Second Action

- CPLR § 205(a) allows for the commencement of a second action that would otherwise be time-barred, within six months after the dismissal of a prior, timely commenced action.
- The safe harbor is ***not*** available where the first action was terminated
  - By voluntary discontinuance
  - Because of failure to obtain personal jurisdiction over the defendant
  - Upon neglect to prosecute the action
  - By dismissal on the merits

CPLR § 205

- The new action must be filed, AND service must be complete within six-months after the prior action is dismissed. *Pyne v. 20 E. 35 Owners Corp*., 267 A.D.2d 168, 169 (2d Dep't 1999).
- Generally under CPLR 205, the plaintiff must be the same plaintiff as before, but there is an exception "where the successor in interest as the holder of the note and mortgage seeks to recommence a foreclosure action originally commenced by a prior holder of the same note and mortgage, which transferred the note and mortgage to the successor in interest *before* the prior action was dismissed." *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 194, 201-02 (2d Dep't 2017) (emphasis in original).
- "A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes." *Caliguri v. JPMorgan Chase Bank, N.A.* 121 A.D.3d 1030, 1031 (2d Dep't 2014).

CPLR § 205 and Dismissals for Neglecting to Prosecute

- Dismissals can be broader than just failure to prosecute under CPLR 3216.
- A plaintiff may be able to invoke CPLR § 205(a)'s tolling provision, *even if the first case was dismissed for neglect to prosecute*.
  - "Where a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." CPLR 205(a).
  - *See also Bank of New York Mellon v. Slavin*, 156 A.D.3d 1073, 1074, 67 N.Y.S.3d 328, 331 (3d Dep't 2017)("Here, the neglect to prosecute exception is inapplicable because the first action was specifically dismissed due to the failure of plaintiff to appear at a mandatory conference . . . and the sua sponte dismissal did not set forth any specific conduct that demonstrated a general pattern of delay.")(citations omitted).
  - *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193, 198-99, 47 N.Y.S.3d 80, 84 (2d Dep't 2017), *appeal dismissed*, 77 N.E.3d 892 (2017) ("The order did not include any findings of specific conduct demonstrating 'a general pattern of delay in proceeding with the litigation' . . . . Thus, the Supreme Court correctly determined that the order of dismissal was not based on a neglect to prosecute.") (citations omitted).

CPLR § 205 and Dismissals for Failure to Send 90-Day Notices

- A dismissal for failure to comply with RPAPL § 1304 is likely not a dismissal "on the merits," so a lender would likely be able to start a new action under CPLR 205. Two cases which don't involve foreclosure are instructive.
  - "Although the [plaintiff] commenced this action within the applicable statute of limitations, it did not meet [a] condition precedent. . . . Under these circumstances, the [plaintiff's] timely claims were properly dismissed without prejudice to refiling pursuant to CPLR 205(a)." *U.S. Bank Nat'l Ass'n v DLJ Mortg. Capital, Inc.*, 141 A.D.3d 431, 432 (1st Dep't 2016), *lv to appeal granted,* 29 N.Y.3d 910, 57 N.Y.S.3d 715 (Table) (2017).
  - Where first action was dismissed for plaintiff's failure to serve a statutorily required notice, the second action which would otherwise have been time-barred, was permitted under CPLR 205(a). "A dismissal for failure to pleading compliance with the condition precedent of Public Authorities Law § 1276(1) is not a dismissal based on a jurisdictional defect such as would preclude application of the provisions of CPLR 205(a)." *Fleming v. Long Island R.R.,* 72 N.Y.2d 998, 1000, 530 N.E.2d 1291 (1988).

Effect of Fraudulent Conduct on Tolling

A defendant "may be estopped from pleading the Statute of Limitations as a defense where a defendant's affirmative wrongdoing produced the long delay in bringing suit" but not where the defendant's "'fraudulent' conduct was not aimed at the plaintiff and did not in any way prevent the plaintiff from commencing a timely action."

Petito v. Piffath, 85 N.Y.2d 1, 6-7, 647 N.E.2d 732 (1994) (internal quotations and citations omitted).

Quieting Title Under RPAPL § 1501(4)

- A mortgagor can bring a claim to cancel and discharge a mortgage upon the expiration of the statute of limitations period:

  "Where the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom . . . In any action brought under this section it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not, been paid."

  NY RPAPL § 1501(4).

Quieting Title Under RPAPL § 1501(4)

- A *prima facie* showing of entitlement to judgment as a matter of law under RPAPL § 1501(4) requires a demonstration that the six-year time limit on enforcing a mortgage has expired.
- Where the mortgagor makes this showing, and the mortgagee fails to raise a triable issue of fact as to the expiration of the limitations period, the mortgagor is entitled to cancelation and discharge of the subject mortgage.

  Rack v. Rushefsky, 5 A.D.3d 753, 753–54, 773 N.Y.S.2d 569 (2d Dep't 2004).

Quieting Title Under RPAPL § 1501(4)

- Can be asserted in a stand-alone quiet-title action seeking declaratory and injunctive relief.

  MSMJ Realty, LLC v. DLJ Mortg. Capital Inc., 157 A.D.3d 885, 69 N.Y.S.3d 870 (2d Dep't 2018); *Kashipour v. Wilmington Savs. Fund Soc., FSB*, 144 A.D.3d 985, 41 N.Y.S.3d 738 (2d Dep't 2016); *JBR Const. Corp. v. Staples*, 71 A.D.3d 952, 897 N.Y.S.2d 223 (2d Dep't 2010).

- Or as a counterclaim in an untimely foreclosure action (which would also allow you to seek attorneys' fees under RPL § 282).

  Citimortgage, Inc. v. Ramirez, 59 Misc.3d 1212(A) (Sup. Ct. Schenectady Ct. Apr. 5, 2018) (Versaci, J.); *U.S. Bank N.A. v. Rowe*, 2017 N.Y. Slip Op. 32819(U) (Sup. Ct. Queens Cty. Jan. 3, 2018) (Pineda-Kirwan, J.).

Quieting Title Under RPAPL § 1501(4)

- Statute requires that "no such action shall be maintainable in any case where the mortgagee, holder of the vendor's lien, or the successor of either of them shall be in possession of the affected real property at the time of the commencement of the action."
  - Practice tip: Be sure to affirmatively plead that the homeowner is in possession of the subject property, and that the mortgagee is not.
  - *CIT Bank, N.A. v. Cameron*, Index Number 703308/2017 (Sup. Ct. Queens Cty. Apr. 11, 2018) (Pineda-Kirwan, J.) (Defendant "has not established entitlement to an order directing the cancellation and discharge of the mortgage as he has not submitted proof that he, and not plaintiff, is in possession of the subject property.").

How to Screen for Statute of Limitations Issues

Some Questions to Ask:

1) When did the borrower default? Was it more than six years ago?
2) If so, did the bank send an acceleration letter? Did the letter clearly and unequivocally accelerate the loan? Was the acceleration letter sent more than 6 years prior to the commencement of the foreclosure action?
3) Did the bank commence a prior foreclosure action more than 6 years before commencing a new case (if a new case is pending)?
   i. If so, was the case dismissed for lack of standing? If yes, then your statute of limitation defense is weak, especially in the Second Department.
4) Has the bank affirmatively and unambiguously revoked acceleration?
5) Did the borrower file for bankruptcy or would a stay have prevented the bank from timely commencing a foreclosure action?
6) Has the bank commenced a new foreclosure action?
7) Has the borrower filed an answer asserting a statute of limitations defense?

Practice Tip #1: Assert SOL Defense in a Timely Answer

A STATUTE OF LIMITATIONS DEFENSE MAY BE WAIVED IF NOT TIMELY ASSERTED.

- *MidFirst Bank v. Ajala*, 146 A.D.3d 875, 44 N.Y.S.3d 771, 772 (2d Dep't 2017), *leave to appeal dismissed*, 81 N.E.3d 1219 (2017), *reargument denied*, 91 N.E.3d 1180 (2017).
  - Borrower "waived the defenses of lack of standing, statute of limitations, and personal jurisdiction by failing to raise them in his answer or in a pre-answer motion to dismiss (see CPLR 320 (b); 3211 (a) (5), (8); (e); *South Point, Inc. v. Rana*, 139 A.D.3d 935, 935-936 (2d Dep't 2016); *Ferri v. Ferri*, 71 AD3d 949, 950 (2d Dep't 2010))."
- *Eke v. City of New York*, 116 A.D.3d 403, 984 N.Y.S.2d 6 (1st Dep't 2014) (defendant "waived the statute of limitations defense by failing to assert it in its answer") (*citing* CPLR 3211(e)).

Practice Tip #2: Assert a Counterclaim Under R.P.A.P.L. § 1501(4)

This is necessary to assert to have the mortgage lien canceled and discharged.

See Deutsche Bank Natl. Tr. Co. v. Gambino, 153 A.D.3d 1232, 1234-35, 61 N.Y.S.3d 299, 301 (2d Dep't 2017)("[T]hat branch of [borrower's] motion which was to cancel and discharge the mortgage pursuant to RPAPL 1501 (4) was properly denied, since that relief must be sought in an action and not by motion."

Practice Tip #3: Include a Claim for Attorneys' Fees Under N.Y. R.P.L. § 282(1)

- N.Y. R.P.L. § 282(1) provides that a mortgagor who successfully defends against "any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract" is entitled to seek reasonable attorneys' fees and costs from the mortgagee, provided that the mortgage expressly allows the mortgagee to collect reasonable attorney's fees and costs for enforcing the mortgage.
- But *Tovar* court said not earned under § 282 – not clear why.

Practice Tip # 4: Statutes of Limitations and FHA Loans

- 28 U.S.C. § 2415(a) establishes a six-year limitations period for the federal government to sue for breach of contract. However, 28 U.S.C. § 2415(c) provides that there is no statute of limitations for the federal government to "bring[ ] an action to establish the title to, or right of possession of, real or personal property."
- Taken together, this means that the federal government is not limited to bring an action in foreclosure, but may not seek a deficiency judgment (or, presumably, bring an action on the note) beyond six years the cause of action accrues. *Westnau Land Corp. v. U.S. Small Bus. Admin*, 1 F.3d 112 (2d Cir. 1993).
- *RCR Servs. v. Herbil Holding Company*, 229 A.D.2d 379, 380 (2d Dep't 1996) (foreclosure claim not time-barred where "the plaintiff, although not the Federal Government, has submitted evidence sufficient to determine as a matter of law that it is prosecuting this claim as an assignee/agent of the Secretary of Housing and Urban Development (hereinafter HUD) and that the ultimate benefits of the foreclosure will flow to HUD.") (See attached brief from *Pearson*).

Practice Tip # 5: Does Plaintiff Have A Possible Unjust Enrichment Claim? (No)

- *Wells Fargo Bank, N.A. v. Burke*, 155 A.D.3d 668, 671, 64 N.Y.S. 3d 228 (2d Dep't 2017) .
  - "'[T]he voluntary payment doctrine . . . bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law' . . . . Here, no fraud or mistake is alleged. Instead, the complaint alleges that the plaintiff advanced funds for the real property taxes 'to maintain its first lien position' and for the hazard insurance 'to protect the property.' These allegations portray the payments as a voluntary, calculated risk to protect the plaintiff's interest in the property while it continued to litigate the validity of the mortgage, rather than the product of mistake or fraud." (internal citations omitted).
- *Costa v. Deutsche Bank Natl. Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1*, 247 F. Supp. 3d 329 (S.D.N.Y. 2017) (denied summary judgment on counterclaim for unjust enrichment because the carrying costs were not made for borrower, and the mere fact that it bestowed a benefit on the borrower is insufficient so sustain a claim)
  - The Lender "took a calculated risk in continuing to pay the" escrow and there was no evidence that this was done for the mortgagor's benefit. If the Lender had succeeded in foreclosing, it "would have enjoyed the fruits of their investment." Here, it turned out being "a losing gamble."

Practice Tip # 6:
Prior Actions Dismissed for Lack of Service

- Some lenders claim that if a defendant wasn't served in a prior action, the loan wasn't accelerated. They're wrong.
  - "[T]he unequivocal overt act of the plaintiff in filing the summons and verified complaint and *lis pendens* constituted a valid election. It disclosed the choice of the plaintiff and constituted notice to all third parties of such choice. To elect is to choose. The fact of election should not be confused with the notice or manifestation of such election." *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 476 (1932) (emphasis added).
  - "[T]he fact that the 2007 action was dismissed as against the defendant homeowner for failure to effectuate personal service does not invalidate the plaintiff's election to exercise its right to accelerate the maturity of the debt. . . . Consequently, the failure to properly serve the summons and complaint upon the homeowner did not as a matter of law destroy the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt." *Beneficial Homeowner Service Corp. v. Tovar*, 150 A.D.3d 657 (2d Dep't 2017).
  - See also: *Clayton National, Inc. v. Guldi*, 307 A.D.2d 982, 982 (2d Dep't 2003); *Citibank, N.A. v. McGlone*, 270 A.D.2d 124, 125, 704 N.Y.S.2d 576, 577-78 (1st Dep't 2000); *City Streets Realty Corp. v. Jan Jay Constr. Enters. Corp.*, 88 A.D.2d 558, 559 (1st Dep't 1982); *Fannie Mae v. 133 Mgmt. LLC*, 126 A.D.3d 670, 670 (2d Dep't 2015).

Practice Tip # 7:
Responding to the *MacPherson* Argument

- In *Nationstar v. MacPherson*, the trial court held that, because the terms of the mortgage permit a borrower to reinstate the loan at any time before a judgment is entered, the loan cannot truly be accelerated until judgment is entered. 56 Misc.3d 339, 351 (Sup. Ct. Suffolk Cty. 2017) (Whelan, J.).
- This decision cannot be reconciled with the established law (*Kashipour v. Wilmington Sav. Fund Soc'y, F.S.B.*, 144 A.D.3d 985, 986 (2d Dep't 2016); *53 PL Realty, LLC v. U.S. Bank N.A.*, 153 A.D.3d 894, 895 (2d Dep't 2017); *U.S. Bank N.A. v. Martin*, 144 A.D.3d 891, 891 (2d Dep't 2016); *Fannie Mae v. 133 Management, LLC Fannie Mae*, 126 A.D.3d 670, 670 (2d Dep't 2015).
- Courts routinely reject *MacPherson's* reasoning: *U.S. Bank N.A. v. Crockett*, 55 Misc.3d 1222(A), at * 3, (Sup. Ct. Kings Cty. June 5, 2017) (Rivera, J.) (specifically rejecting *MacPherson)*; *Flagstar Bank, FSB v. Stanley*, Index No 33758/2015, at * 4-5 (Sup. Ct. Rockland Cty. June 15, 2018) (Berliner, J.) ("*MacPherson* is inapposite and contradictory to settled Appellate Division, Second Department precedent.")
  - But see: *U.S. Bank Trust, N.A. v. Monsalve*, 2017 N.Y. Slip Op. 32764(U), at *1 (Sup. Ct. Queens Cty. Dec. 7, 2017) (Butler, J.); *Wells Fargo Bank, N.A. v. Fetonti*, 2018 N.Y. Slip Op. 20193(U), at *4 (Sup. Ct. Westchester Cty. Jan. 25, 2018) (Ecker, J.).

Practice Tip # 8: Evidence Refuting Claims of Revocation

- If a lender claims to have revoked its prior acceleration, is there evidence that is inconsistent with this claim?
  - Did the lender renew a notice of pendency after "revocation"?
  - Did the lender send statements or bills seeking the full amount, rather than installment payments?
  - Did the lender send correspondence saying that the loan was in foreclosure?
  - Did the lender report to credit reporting agencies that loan is in foreclosure?
  - Did the borrower receive actual notice? What establishes receipt?
- Where can you get this evidence?
  - Discovery demands: all correspondence from servicer, transaction history, payment history (for some servicers, these are two different things)
  - Your client's records
  - Qualified Written Requests/Requests for Information
  - Court records
  - Credit Reports
  - Depositions of lender's employee

Questions?