New York Appellate Division Third Department Joins Second Department on Issues Concerning Mortgage Loan Acceleration and a Borrower's Right to Cure

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Introduction

The New York Appellate Division Third Department reached three notable determinations being closely monitored by the mortgage servicing and lending industry in the case *Wells Fargo Bank, N.A. v. Portu*, 2020 NY Slip Op 00025 (*Portu*). First, that the six-month savings provision in CPLR § 205(a) to initiate a timely lawsuit after the termination of a prior action on the same transaction runs from the expiration of the plaintiff's appellate rights. Second, a letter sent by a mortgagee to a mortgagor does not de-accelerate a mortgage loan if the attempt to de-accelerate the mortgage is pretextual. Third, that the mortgagor's right to cure a payment default under the terms of the mortgage loan[1] does not prevent the "acceleration" of a mortgage loan under New York law.

This decision is important because (i) the first determination re-endorses the Third Department's prior ruling in *Bank of New York Mellon v. Slavin*; (ii) the second determination adopts the new "pretext test" for de-acceleration of a mortgage loan by notice, first established by the Second Department in *Milone v. US Bank National Association*; and (iii) the third determination joins in the rationale of the Second Department in *Bank of New York Mellon v. Dieudonne*.

Facts and Background

In *Portu*, the plaintiff sent a letter to the defendant dated November 9, 2008, advising that the loan was in default after the defendant failed to make a required payment on a mortgage loan. The letter warned the defendant that a failure to make a payment "will result in acceleration of your Mortgage Note."

Subsequently, the plaintiff commenced a foreclosure action on March 8, 2010, to foreclose on the mortgage loan. That action was dismissed without prejudice on June 26, 2013, as abandoned pursuant to 22 NYCRR § 202.27. In May 2014, the plaintiff moved to vacate the June 2013 order and to restore the case to the calendar. In an August 2015 order, the trial court denied the vacate motion and found that the plaintiff had not offered a reasonable excuse for its default and lacked standing. The trial court denied the plaintiff's motion with prejudice but agreed to

accept a motion under CPLR 2221 if made within 60 days of service of the notice of entry. The plaintiff failed to make a CPLR 2221 motion, and the court dismissed the complaint by an order entered July 13, 2016.

While these proceedings were taking place, the plaintiff notified the defendant in a letter dated March 2, 2016, that it was de-accelerating and reinstating the mortgage loan as an installment loan. The plaintiff sent a new default letter and new statutorily required letters, pursuant to RPAPL 1304. The defendant made no further payments, and the plaintiff filed a second foreclosure action on October 11, 2016. The plaintiff moved for summary judgment, and the defendant filed a cross-motion to dismiss. The lower court granted the defendant's cross-motion in part, concluding that the plaintiff's foreclosure action was time-barred. The plaintiff appealed the lower court's decision that the second foreclosure action was untimely.

Determination of the Third Department

There is a six-year statute of limitations to foreclose a mortgage under New York law. CPLR § 213(4). The statute of limitations commences on the entire mortgage debt upon acceleration. The point in time when a mortgage "accelerates" is the subject of much litigation throughout the state. On appeal, the plaintiff argued that its second foreclosure action was not time-barred for three reasons: (i) the second action was timely commenced under CPLR § 205(a)'s savings provision; (ii) the mortgage was de-accelerated by virtue of the March 2, 2016 letter; and (iii) the mortgagee could not have accelerated as defined by New York law because the mortgagor had a right to cure their default until judgment is entered under a reinstatement provision.

(i) First Determination: Re-endorsing *Bank of New York Mellon v. Slavin*

The Third Department began by finding that the question of whether the second foreclosure action was timely commenced under CPLR § 205(a) should be measured from 30 days after the entry of the August 2015 order. The court concluded that the action was "terminated" under the meaning of the statute upon the expiration of the plaintiff's appellate rights from its vacate motion. This determination reaffirmed its prior ruling in *Slavin* that the six-month period in CPLR § 205(a) to commence a subsequent action on the same transaction commences when all appeal rights have been exhausted. Thus, because the plaintiff did not file the second foreclosure action until October 2016, more than six months after termination of the first foreclosure action, it was not timely under CPLR § 205(a).

(ii) Second Determination: Adopting the "Pretext Test" Created by the Second Department in *Milone v. US Bank National Association*

With respect to the plaintiff's second argument, the Third Department adopted the Second Department's decision in *Milone*, that a notice letter does not de-accelerate a mortgage if it is a "pretext." Until the *Portu* decision, no other appellate court in New York had adopted the pretext test, first articulated in *Milone*. The Third Department found that the March 2, 2016 letter was pretextual and did not de-accelerate the mortgage because it did not demand that the defendant resume making monthly payments or provide monthly invoices to the defendant. Moreover, the letter was followed by two other letters affording the defendant 30 days to cure by making a default payment and included the 90-day notice required by RPAPL § 1304 as a condition precedent to filing a foreclosure action.

(iii) Third Determination: Agreeing with *Bank of New York Mellon v. Dieudonne* that a Mortgage Loan Is Accelerated Upon the Mortgagee's Election, Notwithstanding a Borrower's Right to Cure Under a Reinstatement Provision

Finally, the Third Department declined to accept the plaintiff's argument that the mortgage loan had not "accelerated" in light of the right-to-cure provision in the mortgage's reinstatement clause. In doing so, the Third Department accepted the Second Department's interpretation of the right-to-cure provision in *Dieudonne* by finding that it was not a condition

precedent to acceleration and did not deprive the plaintiff of its authority to accelerate the mortgage. Rather, the Third Department found that the right to cure affords the mortgagor a contractual right to de-accelerate the mortgage loan so it may pay the delinquency to have only the foreclosure action discontinued.

Conclusion

In *Portu*, the Third Department endorsed the rulings of three other Appellate Division cases by finding that the six-year statute of limitations for the plaintiff to commence a foreclosure action had expired. It is expected that each of these three determinations will eventually be the subject of review by the New York Court of Appeals.

Particularly on the issue of de-acceleration by notice and until the law is clarified, clients are advised to utilize a belt-and-suspenders approach to comply with the pretext test of *Milone* throughout New York state.

[1] The mortgage at issue was the widely used New York Single-Family Fannie Mae/Freddie Mac Uniform Instrument.
[2] The plaintiff in Dieudonne has moved for leave to appeal to the Court of Appeals, which is pending.