

# NY Second Department Appellate Division Finds that Mortgage Loan is Accelerated for Purposes of the Statute of Limitations Notwithstanding Borrower's Reinstatement Right

Related People:  
Adam M. Swanson  
Jessie D. Bonaros

## Bankruptcy & Commercial Litigation Alert

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In *Bank of New York Mellon v. Dieudonne*, a highly anticipated decision for the mortgage servicing and lending industry, the New York Appellate Division's Second Department held that a residential mortgage accelerates upon the mortgagee/lender's election, notwithstanding a reinstatement provision in the mortgage. This is the first decision in which an appellate court in New York addressed the "MacPherson Argument," which was first articulated in *Nationstar Mtge., LLC v. MacPherson*, (NY Sup. Ct. Suffolk). *MacPherson* borrowed from a Florida State Supreme Court decision holding that for purposes of the statute of limitations, a mortgage loan with a reinstatement provision similar to Section 19 of the Fannie Mae/Freddie Mac standard form does not accelerate until judgment enters. The Second Department disagreed.

### Facts and Background

The underlying foreclosure action was commenced in October 2016 by Bank of New York Mellon (BONY) to foreclose on the defendant's mortgage loan. The defendant moved to dismiss under CPLR § 3211(a)(5), arguing that the six-year statute of limitations to foreclose the mortgage loan had expired. Under New York law, a mortgage contract is an installment contract, and after the loan is accelerated and all installment payments become due, the six-year statute of limitations begins to run on enforcement of the entire debt. The defendant argued that the entire debt was accelerated in June 2010 when BONY previously commenced a foreclosure action against her on the same mortgage (prior action) and alleged in its complaint that it elected to accelerate the mortgage loan.

In opposition to the dismissal motion, BONY argued that Section 19 of the mortgage,<sup>[1]</sup> giving the defendant the right to reinstate the mortgage loan up until judgment enters, meant that the loan had not been accelerated when the prior action was commenced. BONY's argument was that even after the prior action was commenced, the defendant still had a right to pay only installments and was not yet required to pay the full debt. BONY asserted that its right to accelerate was subject to an additional

condition precedent: extinguishment of the defendant's right to reinstate. BONY argued, therefore, that acceleration would only occur when the defendant's right to reinstate was extinguished by entry of judgment as stated in the mortgage documents. Since judgment never entered in the prior action, BONY argued the defendant's mortgage had never been accelerated. The lower court disagreed and granted the defendant's motion to dismiss; BONY appealed.

#### Determination of the Second Department

An action to foreclose a mortgage under New York law is subject to a six-year statute of limitations. CPLR § 213(4). The Second Department began by observing that, "[a]s a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding...the action." While a mortgage is payable in installments, where a mortgage provides the mortgagee/lender with the option to accelerate the entire debt, "some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision." *Id.* After the borrower is provided notice of the election to accelerate and the "mortgage has been validly accelerated in accordance with the terms of the mortgage, 'the entire amount is due and the statute of limitations begins to run on the entire debt.'" *Id.* (citations omitted).

The Second Department rejected the MacPherson Argument, specifically citing that decision and four other lower court decisions that agreed with it. The Second Department analyzed the conditions precedent to acceleration expressly set forth in Section 22 of the defendant's mortgage and noted that Section 19, the borrower's right to cure, was not one of the conditions precedent referenced in Section 22. The Second Department additionally observed that Section 19 itself did not provide that it was a condition precedent to acceleration. As a result, the Second Department found that the mortgage loan was accelerated upon satisfaction of the Section 22 requirements and commencement of the prior foreclosure action. The defendant's Section 19 right, said the Second Department, was a "contractual right to de-accelerate the maturity of the debt." *Id.* at \*4.

#### Conclusion

When addressing the MacPherson Argument, the Second Department expressly stated "that decisional law interpreting the same contractual language [in accordance with MacPherson]...should not be followed." For a more detailed discussion on acceleration and MacPherson, see Adam Swanson's January 2019 article in the *New York Law Journal*: Understanding Mortgage Acceleration and Its Statute of Limitations Implications (subscription required).

[1] The mortgage at issue was a uniform instrument issued by Fannie Mae and Freddie Mac for use in New York.

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