REAL ESTATE

Mortgage Foreclosure SOL: 5-Prong Deacceleration Test

By Andrew Lieb

A mortgage foreclosure lawsuit has a 6-year statute of limitations pursuant to CPLR §213(4). However, dismissal for statute of limitations purposes is largely dependent on lender error because lenders have the unilateral ability to deaccelerate a loan and thereby restart the accrual date of the statute of limitations. As a result, lenders may, through careful monitoring of the statute of limitations, avoid exposure to statute of limitations' dismissal. To clarify, a lender cannot restart the accrual date for previously defaulted mortgage payments, which will continue to be subject to the 6-year statute of limitations and date of default accrual. Instead, a lender can only avoid statute of limitations dismissal with respect to future installment payments, which are only in default because of a lender's prior election to contractually accelerate such payments, which is generally done by summons and complaint (e.g., pleading that lender "hereby elects to declare immediately due and payable the entire unpaid balance of principal"). It is these accelerated payments which may be deaccelerated to reset the accrual date for statute of limitations purposes and thereby preserve the lender's right to future suit. However, whether a deacceleration election is effective has been fragmented in the case law until now, when the Hon. Vincent W. Versaci, J., in *Citimortgage, Inc. v Ramirez*, 2018 NY Slip Op 50525(U) (Sub. Ct. Schenectady Cnty, 2018), compiled these holdings and set forth the "five (5)-prong test," which should become the standard of practice to adjudicate deacceleration motions throughout New York.

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The "five (5)-prong test" is "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must be clear and unequivocal; 3) the affirmative act must give actual notice to the borrower that the acceleration has been revoked; 4) the affirmative act must occur before the expiration of the six (6)-year statute of limitations period; and 5) the borrower must not have changed his or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." In setting forth the test, the Hon. Vincent W. Versaci, J. cited to *Lavin v. Elmakiss*, 302 A.D.2d 638 (3d Dept. 2003) (prongs 1 and 4); *EMC Mortgage Corp v. Patella*, 279 A.D.2d 604 (2d Dept. 2001) (prong 1); *Federal Nat. Mortg. Ass'n v. Mebane*, 208 A.D.2d 892 (2d Dept. 1994) (prongs 1, 4 and 5); *U.S. Bank, N.A. v. Wongsonadi*, 44 Misc.3d 1207(A) (Sup. Ct. Queens Cnty, 2017) (prongs 1 and 4); and *Golden v. Ramapo Imp. Corp*, 78 A.D.2d 648 (2d Dept. 1980) (prong 5). It is noted that prongs 2 and 3 are not expressly set forth in the above citations. However, such prongs were expressly set forth in *U.S. Bank N.A. v. Crockett*, 55 Misc.3d 1222(A) (Sup. Ct. Kings Cnty, 2017), which cited to *Federal Nat. Mortg. Ass'n v. Mebane* as the basis for the prongs.

In establishing the deacceleration test, the *Ramirez* Court was faced with a motion "for summary judgment seeking dismissal of this action, a cancellation and discharge of the mortgage pursuant to RPAPL §1501(4), and for a declaration that his interest in the subject property is free from the mortgage" and a cross-motion for an Order of Reference. The facts at issue were a prior action, which was commenced on May 5, 2010, based upon an installment default on September 1, 2009. Ultimately, that prior action was dismissed, pursuant to CPLR §3215(c), as abandoned. However, the complaint in prior action had accelerated the loan and thereby caused a purported expiration of the statute of limitations on May 5, 2016 for future actions. As a result, the lender sought to deaccelerate the loan, by a "revocation [] letter addressed to the defendant, dated April 14, 2016, which state[d] . . . any previous acceleration of your loan is revoked and nullified. By decelerating your loan, you are no longer obligated at this time to immediately pay all sums due and owing on your loan." As issue before the court was whether this letter deaccelerated the loan was effective.

In applying its newly minted "five (5)-prong test," the court initially found that the letter satisfied prongs 1 and 4 but found a factual issue as to prong 3, actual notice. The factual issue emerged because plaintiff failed to submit competent evidence of mailing of the revocation letter and defendant swore that it was never received. Next, the court found that the letter failed prong 2 because the revocation "was not clear and unequivocal." In making this finding, the court looked to the letter's language that stated the "loan is returned to installment status as a result of the deceleration" and "[w]e may continue to proceed with collection activity, re-acceleration of the debt, and/or foreclosure initiation." The court read

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FREEZE FRAME

First award for Gianna Mia

Kindergartner Gianna Mia Kelly won first place out of 470 science projects from 110 Suffolk County Schools at the 2018 Elementary School Fair. The contest was sponsored by the U.S. Dept. of Energy Brookhaven National Laboratory and coordinated by the Lab's Educational Programs. This was the first time a student from her school district won a project. Gianna Mia is past president, John L. Juliano's granddaughter. She attends Park View Elementary School in Kings Park. Her project was called Does a Crayon Sink or Float? She was given an additional proclamation with six other winners from grades 1-6 from the Suffolk County Legislature. Her parents, Jennifer Juliano Kelly and John Kelly, and sister, Theresa Kelly, along with grandparents John and Eydie Juliano are so proud of little Gianna Mia.

Accessing Information from the Entity's Tax Return? *(Continued from page 13)*

poration election was in effect. Shareholders may receive Subchapter S returns, regardless of the percentage of shares held. However, the Manual notes that:

> Not all Schedules K-1 attached to the Sub-Chapter S return (Form 1120S) can be provided in response to a written request for access. Only the Schedule K-1 for the person making the request can be released. Any other schedules or attachments containing other 3rd party information must be sanitized or withheld per IRC §6103(e)(10). See *Exhibit 11.3.2-3* for more details about what can be released and what needs to be edited or sanitized prior to release.

As for regular C corporations, the Manual explains that a corporation's tax return may be disclosed to any bona fide shareholder of record owning 1 percent or more of the outstanding stock of the corporation. The requester must submit documentation which reasonably demonstrates such ownership. Corporate stock certificates displaying the corporate seal, and a printout from a state regulatory body, such as the Secretary of State's Office, detailing the total outstanding shares of stock currently in existence, may be used to verify the percentage of ownership. The Manual states that:

> If any doubt exists whether the requester meets the 1 percent threshold, it is permissible to contact the corporation whose information is at issue to determine if they agree that the requester owns at least 1 percent of its outstanding stock. The requester should be advised and given an opportunity to withdraw their request if the corporation will be contacted.[3]

All facts and circumstances must be obtained and evaluated, the Manual explains, when determining if a shareholder is a bona fide owner of stock. While the Code does not define the term "bona fide," the Manual states that a shareholder is not considered bona fide if the shares were acquired for the purpose of obtaining the right to inspect the returns of the corporation.[4]

> The requirement that a shareholder be bona fide has a direct correlation to the states' statutory requirements that a shareholder seeking to inspect the books and records of the corporation have a proper purpose to do so. Generally, the "proper purpose" requirement means the purpose for inspection must reasonably relate to the requester's interests as a shareholder but must not be adverse to the interests of the corporation whose information will be accessed. Proper purpose does include . . . a situation where the shareholder is a competitor seeking to take over the corporation. The fact that the shareholder is a competitor, even in a hostile takeover situation, does not defeat the shareholder's statutory right of inspection.

If at first you don't succeed, persevere

Based on the foregoing, a minority owner of a partnership or of an S corporation, and a 1 percent shareholder of a C corporation, should be able to obtain from the IRS a copy of the partnership or corporate tax return, notwithstanding the controlling owner's refusal to share such tax return or to authorize the minority owner to contact the IRS, and notwithstanding what appears to be a lack of knowledge on the part of many IRS employees.

Perhaps some majority owners, if made aware of the minority's ability to legally obtain such information from the IRS – in spite of their efforts to deny such access — will, instead, provide the information voluntarily, perhaps in the hope of heading off, de-escalating, or resolving any dispute, and certainly in the hope of keeping the IRS out of any dispute.[5]

Alternatively, might the controlling owner act more fairly vis-à-vis the minority owner, at least insofar as their treating with the business entity is concerned, if they realize that the minority owner has it within their power to obtain copies of business tax returns from the IRS, and the terms of those transactions are reflected on such returns?[6] One can only hope.

Note: Lou Vlahos, a partner at Farrell Fritz, heads the law firm's Tax Practice Group. Lou can be reached at (516) 227-0639 or at lvlahos@farrellfritzcom.

[1] Why else would one resort to filing Form 4506?
[2] IRM 11.3.2. https://www.irs.gov/irm/part11/irm_11-003-002#idm140350651355376
[3] It is difficult to reconcile this language with our recent experience with requesting copies of tax returns. The Code, Congress, and the Manual contemplate ready access.
[4] They were not acquired for a business purpose.
[5] As the rabbi's son says in the first scene of *Fiddler on the Roof*: "May God bless and keep the czar — far away from us."
[6] Of course, there is always the possibility of a fraudulent return but, in that case, the controlling owner has much more to worry about than a disgruntled minority owner.

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this language to possibly be understood as "the Plaintiff's intention to continue to insist on immediate payment of the entire debt," which is not an unequivocal deacceleration. Further, the court expressly noted that the lender, in the face of this purported deacceleration letter, "continued to send monthly statements to the defendant after April 14, 2016, stating that 'your loan has been accelerated and the accelerated amount is now due.'" Further, the court found that the letter failed prong 5, prejudice, because the defendant detrimentally relied upon the acceleration of the entire debt and ceased making monthly installment payments, at plaintiff's direction, because defendant was instructed that ceasing payments was the only path to a loan modification. Specifically, the court pointed to the following mortgage statement language as the basis for detrimental reliance, to wit: "[a]ny partial payment that you make, other than a full reinstatement or payment of the total amount due, will not be applied to your mortgage but instead will be returned to you".

These findings were made in a second foreclosure action, which was commenced by the lender on Jan. 19, 2017, after the May 5, 2016 expiration of the statute of limitations. The court dismissed this second action based upon its findings that the revocation of the acceleration was ineffective pursuant to its newly minted "five (5)-prong test." This test should be the guidepost for adjudicating future issues of the effective of deacceleration.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer.