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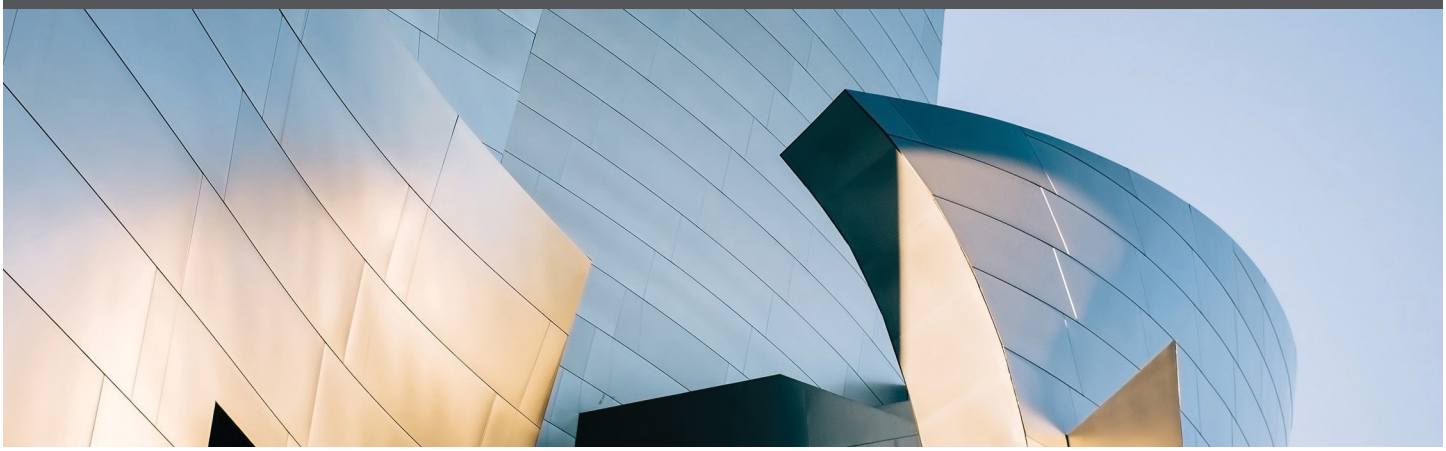
Consumer Finance Litigation



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NY Appellate Court Holds Default Letter Stating Debt "Will Be Accelerated" Does Not Accelerate the Debt, De-Acceleration Must Be Clear and Unambiguous, and Standing, If Raised, Is an Element to De-Acceleration

Mortgagees and their servicers should take note that a New York appellate court has confirmed that a default letter, stating the mortgage debt "will be accelerated" if the default is not cured, does not clearly and unequivocally accelerate the debt. In addition, the appellate court held that de-acceleration notices must be clear and ambiguous, and when standing is raised, it is a necessary element to establish a valid de-acceleration.

In *Milone v. U.S. Bank National Association,* New York's Appellate Division, Second Department ("Second Department"), held that a notice of default sent to a borrower, stating that failure to cure the default within 30 days "will result in acceleration," does not "clearly and unequivocally" accelerate the mortgage debt upon expiration of the cure period. 2018 WL 3863269, at *1, — N.Y.S.3d — (2d Dept. Aug. 15, 2018). In sum, the Second Department concluded that the word "will" indicates a ***future intention*** that "may always be changed in the interim" and, therefore, does not accelerate the debt for statute of limitations purposes. *See id.,* at *3. In addition, the Second Department ruled that a de-acceleration notice must be clear and unambiguous, and, in a case of first impression, held that standing, when raised, is a necessary element to a valid de-acceleration. *See id.,* at *5.

SUMMARY OF FACTS AND CASE BACKGROUND

On or about September 20, 2004, Plaintiff, Diane Milone ("Plaintiff" or "Borrower"), executed a $1,235,000 note ("Note"), which was secured by a mortgage ("Mortgage") against a property in Staten Island, New York. On or about October 1, 2008, Plaintiff defaulted on the loan. As a result, America's Servicing Co. ("ASC") sent a letter to Plaintiff, dated November 16, 2008, advising her that the loan was in default, and that if the stated amount was not paid within 30 days, "the circumstances ***'will result in the acceleration of your Mortgage Note*** … [and that o]nce acceleration has occurred, a foreclosure action, or any other remedy permitted under the terms of your Mortgage or Deed of Trust, may be initiated.'" *Milone,* 2018 WL 3863269, at *3 (emphasis added).

Plaintiff failed to cure her default, and U.S. Bank, successor-in-interest to ASC, commenced a foreclosure action on January 13, 2009 ("2009 Foreclosure Action"). The 2009 Foreclosure Action was subsequently dismissed because U.S. Bank did not produce the original note to establish standing. Subsequently, Wells Fargo Bank, N.A. ("Wells Fargo"), as U.S. Bank's loan servicer, sent Plaintiff a letter, dated October 21, 2014, noting Plaintiff's continued default on the Note and stating that "Wells Fargo '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.'" *Id.,* at *1.

On March 10, 2015, Plaintiff commenced a quiet title action, pursuant to RPAPL § 1501(4), seeking to cancel and discharge the mortgage and note on the basis that the statute of limitations to foreclose on the Mortgage expired. Plaintiff's claim is based on the argument that the November 16, 2008 default letter ("2008 Default Letter") accelerated the Mortgage debt because it stated that failure to cure the default "will result in acceleration" of the debt.

In New York, an action to foreclose upon a mortgage is governed by a six-year statute of limitations. *See* CPLR 213(4).). "The statute of limitations on a foreclosure action begins to run six years from the due date for each unpaid installment or the time the mortgage is entitled to demand full payment, or when the mortgage has been accelerated by demand or an action is brought." *Saini v. Cinelli Enterprises, Inc.,* 289 A.D.3d 770, 776, 733 N.Y.S.2d 824 (3d Dept. 2001). Once accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt. *Milone,* 2018 WL 3863269, at *3 (citations omitted).

The mortgage debt may be accelerated by a notice sent to borrower by the creditor or creditor's loan servicer; however, the notice to the borrower must "clearly and unequivocally" establish the creditor's intent to accelerate the mortgage debt upon the expiration of the cure period listed in the notice. *See id.* (citations omitted).

U.S. Bank filed a motion to dismiss the action under CPLR 3211(a)(1) and (7) based on documentary evidence establishing that the statute of limitations to foreclose on the Mortgage had not expired. Specifically, U.S. Bank argued that the Wells Fargo letter to Plaintiff, dated October 21, 2014, de-accelerated the Mortgage debt within six years of the prior acceleration (the "Deceleration Letter"). Plaintiff cross-moved for summary judgment arguing that (i) U.S. Bank had no right to de-accelerate based on the Note or Mortgage; (ii) U.S. Bank does not possess the original Note and therefore lacked standing; (iii) once the option to accelerate is exercised, it cannot be revoked; and (iv) de-acceleration and extending the statute of limitations would violate public policy and was *per se* prejudicial to Plaintiff.

The Richmond County Supreme Court ("Lower Court") granted U.S. Bank's Motion to Dismiss and denied Plaintiff's Cross-Motion for Summary Judgment. Plaintiff appealed.

SECOND DEPARTMENT'S DECISION

The Second Department modified the Lower Court's decision, finding that the Lower Court should have denied U.S. Bank's Motion to Dismiss, but affirmed the Lower Court's denial of Plaintiff's Cross-Motion for Summary Judgment. In reaching its decision, the Second Department addressed several heavily-litigated statute of limitations issues regarding the acceleration and de-acceleration of mortgage debts.

First, the Second Department found that "both parties have been under a mistaken impression that the [2008 Default Letter] fixed the date of the acceleration for statute of limitations purposes." *Id.,* at *3. Rather, the Second Department held that "[t]he language in the letter, that the plaintiff's failure to cure her delinquency within 30 days 'will result in the acceleration' of the note, was ***merely an expression of future intent that fell short of an actual acceleration."*** *Id*. (emphasis added). Specifically, the Court reasoned that "[t]he notice to the plaintiff was not clear and unequivocal, as future intentions may always be changed in the interim." *See id.* Notably, the Second Department also pointed out that "[i]n making this finding, we respectfully disagree

with our colleagues in the Appellate Division, First Department, who addressed similar language and held otherwise…." *Id.*

Second, the Second Department held that de-acceleration notices must be clear and unambiguous, and the Wells Fargo Deceleration Letter met that standard because it contained "a clear and unequivocal demand that the homeowner meet her prospective monthly payment obligations…." *Milone,* 2018 WL 3863269, at *4. "In contrast, a 'bare' and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations." *Id.* Notably, the Second Department explained that while Plaintiff met her initial burden for summary judgment, U.S. Bank's timely Deceleration Letter raised a triable issue of fact. *Id.,* at *5. Therefore, the Lower Court properly denied Plaintiff's Cross-Motion. The Second Department also rejected Plaintiff's argument that the Note did not permit the lender to revoke any acceleration, finding that since the contractual right to accelerate is "discretionary rather than mandatory, U.S. Bank maintained the right to later revoke the acceleration." *Id.*

Third, in a case of first impression, the Second Department held for the first time "that just as standing, when raised is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration…." *Id.* Although the Deceleration Letter was clear and unequivocal, the Second Department found that it did not establish that U.S. Bank had standing to de-accelerate and no other evidence submitted established standing. *Id.* As such, the Second Department ruled that the documentary evidence on U.S. Bank's Motion to Dismiss did not utterly refute Plaintiff's allegation that the statute of limitations had expired. *Id.*[1]

CONCLUSION

The *Milone* decision is a victory for lenders and mortgage servicers, as it expressly confirms that in the Second Department, a default letter stating that the debt "will be accelerated" does not accelerate the debt for statute of limitations purposes. As such, this decision highlights the current split in New York appellate authority between the First and Second Departments regarding this heavily-litigated issue, which is ripe for the Court of Appeals to adjudicate. This decision is also significant because, for the first time, the Second Department held that if standing is raised, it is a necessary element to establish a valid de-acceleration of a mortgage debt. Finally, the Second Department has provided guidance regarding what constitutes a "clear and unequivocal" de-acceleration. Based on *Milone*, a de-acceleration letter should contain an express demand for monthly payments on the note. If the letter does not contain such demand, it should be accompanied by copies of monthly invoices for installment payments, or other forms of evidence showing that the lender was truly seeking to de-accelerate. Unfortunately, the Second Department did not provide further guidance regarding what other forms of evidence would be sufficient to support de-acceleration.

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1. The Second Department also rejected Plaintiff's argument that de-acceleration substantially prejudiced her, noting that Plaintiff defaulted on the loan in October 2008, and since that time, had not paid the mortgage, any rent or any property taxes, but continued to reside in a property likely worth more than $1 million. *Id.,* at *6.