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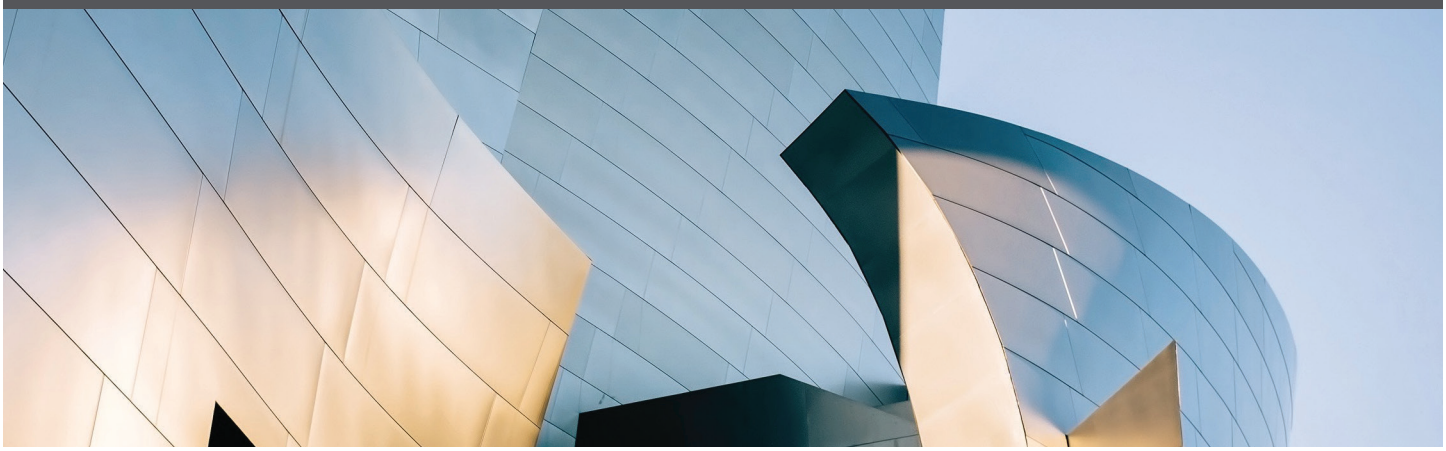

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New York Appellate Court Rejects Usage of a Mortgage's Reinstatement Provision as a Defense to the Expiration of the Statute of Limitations

New York's Second Department, in rejecting the MacPherson line of cases, holds mortgage's reinstatement provision is not a condition precedent to accelerating the debt and therefore does not prevent a lender from exercising its option to accelerate. Thus, lenders and mortgage servicers can no longer rely on the reinstatement provision to argue that the statute of limitations to foreclose was not triggered.

On March 13, 2019, in a case of first impression, New York's Appellate Division, Second Department ("Second Department") issued a decision holding the reinstatement provision of a mortgage does not prevent the acceleration of the loan prior to entry of a foreclosure judgment. In ***Bank of New York Mellon v. Dieudonne***, 2019 WL 1141973 (2d Dept. Mar. 13, 2019), the Second Department affirmed the Kings County Supreme Court's decision granting defendant Dieudonne's ("Defendant") motion to dismiss the complaint pursuant to CPLR 3211(a)(5) because the foreclosure action was barred by the expiration of the statute of limitations. Specifically, the Second Department held that "the extinguishment of the defendant's contractual right to de-accelerate the maturity of the debt pursuant to the reinstatement provision of paragraph 19 of the mortgage was not a condition precedent to the plaintiff's acceleration of the mortgage" and therefore, acceleration occurred upon commencement of the prior foreclosure action.

SUMMARY OF FACTS AND BACKGROUND

In October 2016, plaintiff Bank of New York Mellon ("BONY") commenced an action to foreclose on Defendant's mortgage in the Supreme Court, Kings County (the "Lower Court"). Defendant moved to dismiss the action pursuant to CPLR 3211(a)(5) alleging that the statute of limitations to foreclose had expired. Specifically, Defendant argued that the entire debt was accelerated in June 2010 (the "2010 Action"), when the BONY commenced a prior foreclosure action upon the same mortgage.

In opposition to the motion, BONY argued that Section 19 of the mortgage prevented it from accelerating the debt by merely commencing a foreclosure action because BONY's right to accelerate the entire outstanding debt was subject to Defendant's right to reinstate the loan up until an entry of a Judgment of Foreclosure and Sale.[1] As such, BONY asserted that its right to accelerate was subject to a condition precedent and, therefore, the statute of limitations to foreclose did not begin to run until Defendant's right to de-accelerate/reinstate was extinguished upon entry of a Judgment of Foreclosure and Sale.[1] The Lower Court granted Defendant's motion to dismiss, and BONY appealed.

THE SECOND DEPARTMENT'S DECISION

Under New York law, an action to foreclose a mortgage is subject to a six-year statute of limitations. ***See*** CPLR 213(4). Where a mortgage provides the holder of the note and mortgage with the option to accelerate the entire debt, some affirmative action evidencing the holder's election to accelerate must be taken. ***Bank of New York Mellon v. Dieudonne***, ***supra*** 2019 WL 1141973, at *2 (citations omitted). A borrower must be provided with notice of the lender's decision to exercise the option to accelerate. (***Id***.) (citations omitted). Once a mortgage is accelerated, the statute of limitations begins to run. (***Id***.) (citations omitted).

BONY argued that the commencement of the 2010 Action did not accelerate the debt such that the statute of limitations to foreclose had expired. Specifically, BONY argued that the express terms of the mortgage—the reinstatement provision in Section 19—prohibited BONY from accelerating the debt because Defendant had the contractual option to de-accelerate and reinstate the loan. As such, because the right to accelerate was subject to a condition precedent, the statute of limitations could not be triggered until Defendant's right to de-accelerate was extinguished under the terms of the mortgage, ***i.e.,*** upon entry of Judgment of Foreclosure and Sale. ***See, e.g., Nationstar Mtge., LLC v. MacPherson,*** 56 Misc. 3d 339, 350, 54 N.Y.S.3d 825 (N.Y. Sup. Ct. Suffolk Cty. Apr. 3, 2017).

The Second Department explicitly rejected ***MacPherson*** and its progeny and affirmed the Lower Court's decision. Importantly, the Second Department analyzed Section 22 of Defendant's mortgage explaining that Section 22 identified specific conditions that must be satisfied before a lender is entitled to exercise its option to accelerate the debt, but Section 19—the reinstatement provision—was ***not*** referenced in, or included among, the conditions listed in Paragraph 22. Further, the Second Department noted that Section 19 did ***not*** include language indicating that it served as a condition precedent to BONY's right to accelerate. As a result, the Second Department held the extinguishment of Defendant's right to de-accelerate and reinstate the debt pursuant to Section 19 was ***not*** a condition precedent to BONY's acceleration of the mortgage.

CONCLUSION

This decision is the first New York appellate decision addressing the ***MacPherson*** lineage of cases and resolves a split among the Second Department's lower courts, which took contrasting positions regarding a lender's ability to rely on the reinstatement provision in these Fannie Mae/Freddie Mac uniform mortgages. The Second Department explicitly held "to the extent that decisional law interpreting the same contractual language holds otherwise, it should not be followed." Thus, the Section 19/***MacPherson*** argument is no longer a viable argument in the Second Department.

Mr. Streibich would like to Diana M. Eng, Jonathan M. Robbin, and Andrea M. Roberts for their assistance in developing this alert.

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