# Assisting Pro-Se Defendants in Answering Foreclosure Complaints

Presented by Catherine Isobe, Brooklyn Legal Services, January 13, 2023

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By Queens Legal Services

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## CPLR 3408(m)

"A defendant who appears a the settlement conference but who failed to file a timely answer, pursuant to [CPLR 320], shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of the appearance at the settlement conference. The default shall be deemed vacated upon the service and filing of an answer."

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## Overview of Available Defenses

- Service of Process
- Standing
- Conditions Precedent
  - Statutory
  - Contractual
  - RESPA/FHA
- Statute of Limitations*

*(See separate presentation)

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## Overview of Available Defenses

- Reverse Mortgage Defenses
- Excessive Interest
- Certificate of Merit
- Actions against deceased parties
- Counterclaims:
  - Attorneys Fees
  - Quiet Title*

  *(See separate presentation)

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## Service of Process

- Service should be made pursuant to CPLR 308.
- 60 days to move to dismiss after improper service raised in answer. CPLR 3211(e).
  - But, motions held in abeyance during settlement conferences. CPLR 3404(n).

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## Standing

- Where a foreclosing plaintiff is not the original lender and standing is disputed, Plaintiff must prove its standing in order to be entitled to the equitable relief of foreclosure. *Wells Fargo Bank, N.A. v. Maleno-Fowler*, 194 A.D.3d 1094, 1095 (2d Dep't 2021);
- "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced." *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279 (2d Dep't 2011).

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## Standing as "Holder"

- Governed by Article 3 of NY UCC.
- A **holder** is defined under the UCC as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." N.Y. U.C.C. § 1-201(21).
  - Indorsements are either specific or "in blank." N.Y. U.C.C. § 3-204.
  - A holder may enforce a negotiable instrument at will. N.Y. U.C.C. § 3-301.
  - Practice tip: New York's U.C.C. differs from model UCC, so be sure to use the state specific commentary and case law.

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## Standing as "Holder"


[redacted]
WITHOUT RECOURSE

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## Standing as "Holder" What is an Allonge?

- "An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." N.Y. U.C.C. § 3-202(2).
- An indorsement made on a separate paper firmly affixed to the promissory note is commonly referred to as an allonge. Official Comment to N.Y. U.C.C. § 3-202, ¶ 3.

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## An allonge must be "firmly affixed" to the note

- Plaintiff must demonstrate that allonge is firmly affixed to note.
  - Where "the purported endorsement [was] attached by a paperclip, [it] was not so firmly affixed to the note as to become a part thereof. As such, the purported endorsement did not constitute a valid transfer of the underlying note to the plaintiff." *HSBC Bank USA, Nat'l Ass'n v. Roumiantseva*, 130 A.D.3d 983, 985 (2d Dep't 2015).
  - "Although the plaintiff attached to the complaint copies of the note and an undated purported allonge endorsed in blank, the plaintiff did not demonstrate that the purported allonge, which was on a piece of paper completely separate from the note, was 'so firmly affixed thereto as to become a part thereof,' as required by UCC 3-202(2)." *Raymond James Bank. NA v. Guzzetti*, 202 A.D.3d 841, 843 (2d Dep't 2022); *U.S. Bank, N.A. v. Ainsley*, 192 A.D.3d 1188, 1189 (2d Dep't 2021)

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## Standing as Assignee

- Written assignment of an instrument only vests the assignee with the actual rights assigned. N.Y. U.C.C. § 3-201.
- "[A] negotiable instrument may be transferred either by assignment or negotiation. In contrast with a 'negotiation,' an assignment does not confer the special rights which are given to 'holders' of a negotiable instrument." 80 N.Y. Jur. 2d § 275.
- Plaintiff alleging assignment must demonstrate unbroken chain of assignments (or proof of negotiation) from origination.
  - *Arch Bay Holdings, LLC v. Albanese*, 146 A.D.3d 849, 853 (2d Dep't 2017) ("Arch Bay also failed to establish standing based upon an assignment of the note and mortgage from MERS to Wachovia prior to commencement of the action, as Arch Bay failed to establish delivery or assignment of the note to MERS prior to its execution of the assignment to Wachovia.")

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## Lost Notes

- The summons & complaint will sometimes contain a "lost note affidavit."
- Lost promissory notes are governed by UCC § 3-804, which allows the alleged owner to sue to enforce the note, but also provides that "[t]he court shall require security, in an amount fixed by the court not less than twice the amount allegedly unpaid on the instrument, indemnifying the defendant . . . against loss, including costs and expenses, by reason of further claims on the instrument. "

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## Statutory Conditions Precedent RPAPL 1303

- RPAPL 1303 "Help for homeowners" notice
  - Required statutory language on different colored paper.
  - *First Nat'l Bank of Chicago v. Silver*, 73 A.D.3d 162, 169 (2d Dep't 2010).
  - *MTGLQ Investors, L.P., v. Assim*, 209 A.D. 3d 1006, 1008-1009 (2d Dep't 2022) "The process server's affidavit of service did not indicate that the notice served upon the defendant complied with all of the requirements of RPAPL 1304."

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## Statutory Conditions Precedent RPAPL 1304

- RPAPL 1304 "90-day notice"
  - Required statutory language with list of at least five housing counselors serving the county where the property is located, sent certified/registered mail and first class mail.
  - (most cited) *Aurora Loan Services, LLC v. Weisblum*, 85 A.D.3d 95, 103 (2d Dep't 2011).
  - "[P]laintiff failed to comply with RPAPL 1304 when it sent additional material in the same envelope as the requisite notice under RPAPL 1304." *Bank of Am., N.A. v. Kessler*, 202 A.d.3d 10, 19 (2d Dep't 2021) (appeal pending)

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## Statutory Conditions Precedent RPAPL 1306

- RPAPL 1306 filing with NYS Dep't of Financial Services
  - Must be done within three days of mailing of 90-day notice.
  - *TD Bank, N.A. v. Oz Leroy*, 121 A.D.3d 1256, 1260 (3d Dep't 2014).
- Compliance with RPAPL 1303, 1304, and 1306 is strictly construed, and may be raised at any time by a defendant, provided that the defendant has appeared in the action. *Citimortgage, Inc. v. Espinal*, 134 A.D.3d 876, 879 (2d Dep't 2015).

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## Contractual Conditions Precedent

- CPLR 3015(a): "The performance or occurrence of a condition precedent need not be pleaded. A denial of performance or occurrence shall be made specifically and with particularity."

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## Contractual Conditions Precedent Notice of Default

Paragraph 22 of Fannie Mae/Freddie Mac Uniform Mortgage:

"Lender may require Immediate Payment in Full under this Section 22 only if all of the following conditions are met: . . .

(b) Lender sends to me, in the manner described in Section 15 of this Security Instrument, a notice that states:

(1) The promise or agreement that I failed to keep or the default that has occurred;

(2) The action that I must take to correct that default;

(3) A date by which I must correct the default. That date will be at least 30 days from the date on which the notice is given;

(4) That if I do not correct the default by the date stated in the notice, Lender may require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale.

(5) that if I meet the conditions stated in Section 19 of this Security Instrument, I will have the right to have Lender's enforcement of this Security Instrument stopped and to have the Note and this Security Instrument remain fully effective as if Immediate Payment in Full had never been required; and

(6) That I have the right in any lawsuit for Foreclosure and Sale to argue that I did not keep my promises and agreement under the Note and under this Security Instrument, and to present any other defenses that I may have."

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## Contractual Conditions Precedent Notice of Default

*U.S. Bank, N.A. v. Sabloff*, 153 A.D.3d 879, 880-81 (2d Dep't 2017).

"[T]hat branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against Sabloff should have been denied, since the evidence submitted in support of the motion failed to establish, *prima facie,* that the required notice of default was in fact mailed to Sabloff ... which was required by the terms of the mortgage as a condition precedent to foreclosure."

The 90-day notice required by RPAPL 1304 does not satisfy the requirements of default notice in most mortgages.

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## Conditions Precedent
## FHA Pre-Foreclosure Requirements

- FHA regulations are specifically incorporated into FHA notes, including regulations concerning when a lender may call the loan due and payable. (So these are both contractual and regulatory conditions precedent.)
- But always review the chain of assignments to find out whether the loan was sold back to HUD and then re-sold, as part of HUD's Distressed Asset Sales Program (DASP. If this is the case, FHA rpre-foreclosure requirments and other HUD regulations will no longer apply to the loan.
- Lender must provide notice of default to borrower before the end of the second month of delinquency.
  24 C.F.R. § 203.602.
- Lender must make reasonable attempt to arrange a face-to-face interview with borrower before three monthly payments are unpaid.
  24 C.F.R. § 203.604.

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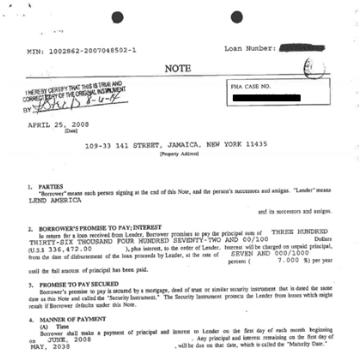
## How to tell that a loan was FHA Insured at Origination



MIN: 1002862-2007048502-1 Loan Number: [redacted]

NOTE

FHA CASE NO. [redacted]

APRIL 25, 2008
(Date)

109-33 141 STREET, JAMAICA, NEW YORK 11435
(Property Address)

1. PARTIES
"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means LEND AMERICA
and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST
In return for a loan received from Lender, Borrower promises to pay the principal sum of THREE HUNDRED THIRTY-SIX THOUSAND FOUR HUNDRED SEVENTY-TWO AND 00/100 Dollars (U.S. $ 336,472.00 ), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of SEVEN AND 000/1000 percent ( 7.000 %) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED
Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT
(A) Time
Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on JUNE, 2008 . Any principal and interest remaining on the first day of MAY, 2038 , will be due on that date, which is called the "Maturity Date."

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## Regulatory Conditions Precedent
## RESPA Violations

- Within 36 days of delinquency, the servicer must attempt to establish live contact with borrower to discuss loss mitigation options.
  12 C.F.R. § 1024.39(a).
- Within 45 days of delinquency, the servicer must send borrower written notice that includes servicer's contact info, information regarding loss mitigation, and available housing counselors.
  12 C.F.R. § 1024.39(b).

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## Regulatory Conditions Precedent RESPA Violations

- A servicer cannot commence a foreclosure action unless the borrower is more than 120 days delinquent.
  12 C.F.R. § 1024.41(f)(1)(i).
- "Dual Tracking" A servicer may not commence a foreclosure action if there is a pending loss mitigation package submitted by the borrower.
  12 C.F.R. § 1024.41(f)(2).

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## Statute of Limitations

- 6 year limitations period for "an action upon a bond or note, the payment of which is secured by a mortgage upon real property." CPLR § 213(4).
- The six-year statute of limitations begins to run:
  - from the due date for *each* unpaid installment; or
  - the time the mortgagee is entitled to demand full payment; or
  - when the mortgage has been *accelerated* by a proper demand; or
  - when a foreclosure action is commenced.
- SEE SEPARATE PRESENTATION BY AMY HAMMERSMITH OF QUEENS LEGAL SERVICES

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## Reverse Mortgage Defenses

- Reasons for reverse mortgage defaults:
  - Non-occupancy of borrower
  - Death of borrower
  - Failure to pay property taxes and/or hazard insurance
  - Failure to maintain property or make necessary repairs
- Federally insured reverse mortgages are regulated by HUD guidelines. Almost all reverse mortgages are federally insured.

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## Reverse Mortgage Defenses

- Specialized 90-day notices. RPAPL § 1304(1-a)
- Notice of Default requirements that are different from notice required in traditional mortgages.
- Failure to secure approval from HUD to call loan "due and payable."
- If failure to pay property charges
  - Did lender give borrower chance to enter repayment?
  - Did borrower have sufficient balance on line of credit to cover payments?

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## Excessive Interest

- CPLR 5001(a) provides that in an action of an equitable nature (such as foreclosure) "interest and the rate and date from which it shall be computed shall be in the court's discretion."
- If the plaintiff delayed unnecessarily in bringing the action, the defendant can raise this as a possible defense to the total amount of the judgment, but not as a substantive defense to the overall foreclosure action.

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## Certificate of Merit

- CPLR 3012-b requires that the plaintiff's attorney in foreclosure actions must certify that the attorney has reviewed the facts of the case and the underlying documents, and must attach a copy of the note, mortgage, and any modification agreements to either the complaint or the certificate of merit.
- Plaintiff who "willfully fails" to provide copies of the required documents is subject to dismissal of the complaint without prejudice, upon the motion of any party or of the court, on notice to the parties. CPLR 3012-b(e).

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## Actions Against Deceased Parties

- "A party may not commence a legal action or proceeding against a dead person, but must instead name the personal representative of the decedent's estate." *Jordan v. City of New York*, 23 A.D.3d 436, 437 (2d Dep't 2005).
- An action commenced against a decedent is "a nullity from its inception." *Krysa v. Estate of Qyra*, 136 A.D.3d 760, 760 (2d Dep't 2016).
- Not able to cure this defect by amending the caption. *Krysa*, 136 A.D.3d at 761; *Marte v. Graber*, 58 A.D.3d 1, 4 (1st Dep't 2008).

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## Attorneys' Fees Counterclaim

- Real Property Law § 282 provides that if the mortgage includes a provision allowing the lender to seek attorneys fees as a result of breach, "there shall be implied in such mortgage a covenant by the mortgagee to pay the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor as a result of . . . the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor."
- Modeled after language in RPL § 234 in the landlord/tenant world. *DKR Mortgage Asset Trust 1 v. Rivera*, 130 A.D.3d 774, 775 (2d Dep't 2015).

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## Questions?

Contact:
Catherine Isobe
Brooklyn Legal Services
717-233-6434
cisobe@lsnyc.org

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Legal Services NYC

# How To Answer A Foreclosure Complaint

# "Pro Se" (without an attorney)

## New York City

December 2, 2016

**DO NOT IGNORE THE FORECLOSURE LAWSUIT**

**EVEN IF YOU ARE NEGOTIATING WITH YOUR LENDER …**

**IF YOU DO NOT ANSWER THE FORECLOSURE COMPLAINT IN WRITING, YOU COULD LOSE YOUR HOME**



# OVERVIEW

## ***What is a Foreclosure?***

A foreclosure is a lawsuit that is filed when the mortgage is not being paid. The person sued is the person who borrowed the money and signed the mortgage. This person is called the Defendant. (There will be other defendants in a foreclosure lawsuit who did not borrow the money. These other defendants may be tenants. Or they may be persons who have a judgment against the homeowner. Or they may be agencies who have issued fines against the homeowner.) The person or company that brings the foreclosure lawsuit is called the Plaintiff. The Plaintiff either owns the mortgage or is an agent of the owner of the mortgage.

# OVERVIEW

The Plaintiff files a foreclosure lawsuit to ask the court to sell the home in order to repay the mortgage debt.

The Defendant has the right to go to court to fight the case, either with or without a lawyer. In order to be able to fight the case, the Defendant first has to file an Answer to the foreclosure complaint. These instructions are meant to help you with the Answer.



# OVERVIEW

## ***What is the difference between the Note and the Mortgage?***

The Note is the promise to repay the money that was borrowed. Think of it as an I.O.U.

The Mortgage is the document that allows the lender to foreclose on the home if the Note is not paid.

In order for a Plaintiff to foreclose, it must own both the Note and the Mortgage.

## ***What is a pro se litigant?***

A pro se litigant is a person who starts or defends a lawsuit without a lawyer.

# DO NOT IGNORE A FORECLOSURE LAWSUIT EVEN IF YOU ARE NEGOTIATING WITH YOUR LENDER ...

## *Why is it important to file an Answer?*

When you file an Answer to the foreclosure Complaint you have the right to defend the foreclosure case in court. If you do not file an Answer to the foreclosure Complaint, you will lose the right to defend the case in court. Also, when you file an Answer you will receive all future notices about what is happening with the case. If you do not file an Answer, the next notice you will receive will be the judgment of foreclosure and sale.

**Make sure to make a copy of your Answer for your own records. Make sure to make a copy of your proof of service of the Answer for your records. Keep copies of all court documents for your records.**

**Remember:** This guide will show you how to prepare, serve, and file an Answer to the foreclosure Complaint. But this should not replace finding an attorney or non-profit housing counselor to assist you. Please call one of the resources listed at the end of this document for assistance.



# ...YOU COULD LOSE YOUR HOME!!!

## Preparing to Respond

### *What is the deadline for you to respond?*

- If the court papers were handed to you in person, then you have 20 days from the date you received the papers to answer.
- If you were served in any other way, you have 30 days to answer. This means that if the papers were handed to someone else who lives at your home, or if the papers were left at your doorstep and mailed to you, you have 30 days to answer.

**Do not wait until the last day!**
**Preparing an Answer takes time.**

### *Where can you get the form you need?*

A blank Answer form is included with this guide.

### *Where can you find the information you need to respond?*

The information you need to respond comes from three places. First, some of the information you need will be on the Summons and Complaint that you are answering. Second, some of the information you need will be in your mortgage papers. Third, some of the information you need will be from your personal experience.

# Sample Summons

This sample foreclosure Summons shows the information you need to copy to your Answer.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

COPY

----------x

LASALLE BANK NATIONAL ASSOCIATION, TRUSTEE,

Index No.: 17302/08

Plaintiff,

D/O/F: 7/18/08

-against-

**SUMMONS**

JANE DOE;
ENCORE CREDIT CORP; NAB CONSTRUCTION CORP; AMERICAN EXPRESS TRAVEL RELT'D SV CO INC; NEW YORK CITY PARKING VIOLATIONS BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

THE BASIS OF VENUE IS THAT THE PROPERTY IS SITUATED IN SAID COUNTY

Defendants.

----------x

TO THE ABOVE NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action, and to serve a copy of your Answer, or, if the Complaint is not served with this Summons, to serve a Notice of Appearance on the Plaintiff's Attorneys within twenty (20) days after the service of this Summons, exclusive of the day of service, where service is made by delivery upon you personally within the State, or within thirty (30) days after completion of service where service is made in any other manner, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The following notice is intended only for those defendants who are owners of the premises sought to be foreclosed or who are liable upon the debt for which the mortgage stands as security.

**YOU ARE HEREBY PUT ON NOTICE THAT WE ARE ATTEMPTING TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

The amount of the Debt: $351,450.53 consisting of principal balance of $336,865.02 plus interest of $10,032.02, escrow/impound shortages or credits of $2,863.07, late charges of $191.12; Broker's Price Opinion, inspection and miscellaneous charges of $79.30; attorney fee $925.00 and title search $495.00. Because of interest and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown



# Filling out the Answer

**Step 1:** Fill in the box at the top of the Answer form by copying the information that is in the box at the top of the Summons. See the example below.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Plaintiff,

v.

**Index No.** _____

**VERIFIED ANSWER TO FORECLOSURE COMPLAINT**

Defendant(s).

**Defendant** _____ **answers as follows:**

I generally deny each allegation of the Complaint, including that Plaintiff is the owner of the note and mortgage.

**I plead the following Defenses and Counterclaims:**

- ☐ **Lack of Standing**: Plaintiff, upon information and belief, does not own the note and mortgage. Plaintiff therefore does not have standing to sue because it was not the legal owner of the note and/or mortgage at the time it commenced this foreclosure lawsuit.
- ☐ **Foreclosure Cause of Action**: Plaintiff, upon information and belief, does not own the note and mortgage. Because ownership of the note and mortgage is an element of a foreclosure cause of action, Plaintiff has no right to foreclose.
- ☐ **Statute of Limitations** (NY Civil Practice Law and Rules § 213(4)): Upon information and belief, Plaintiff may not sue on all or part of the mortgage debt because Plaintiff commenced this action more than six years after the debt became due.
  - ☐ Additionally, the entire foreclosure action is time-barred by the statute of limitations because Plaintiff commenced this action more than six years after it accelerated the mortgage debt. Defendant requests that the mortgage be cancelled and discharged pursuant to NY Real Property Actions and Proceedings Law § 1501(4).
- ☐ **Service of Process** (NY Civil Practice Law and Rules § 308): I was not properly served with process in this action for the following reason(s):_____

**Step 2:** Fill in your name on the first line of the Answer, after the word "Defendant."

**Step 3:** Check off any of the defenses listed in the form that you believe apply to you. See pages ___ for an explanation of the common defenses to foreclosure.

# FILLING OUT THE ANSWER (CONT'D)

**STEP 4:** Add any additional information that you want the Court to know about in the blank spaces at the end of the form, after the title "Other Defenses or Counterclaims." (See pages ____ below for a discussion of this section.)

other dilatory conduct causing excessive interest to accrue which the Court may reduce or toll, as a matter of equity and by operation of the CPLR.

□ **Action Commenced Against a Deceased Party**: This action is a nullity because it was commenced against Defendant _____ after that party was already deceased and before a personal representative was appointed and it should therefore be dismissed.

□ **Payment or Partial Payment:** I have paid, in whole or in part, the amounts claimed by Plaintiff.

□ **Other Defenses or Counterclaims** (*attach additional pages if needed*):

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Wherefore, Defendant requests that the Complaint be dismissed; that the relief requested by Defendant be granted in its entirety; that Defendant be granted costs and attorneys' fees if he



**STEP 5:** Fill in the bottom of page 4 with your current contact information.

or she retains counsel; and any other relief allowed by law deemed just and proper by this Court in the exercise of its equity jurisdiction in this foreclosure action.

Dated: _____, 20_____

_____, New York

_____, Defendant *Pro Se*
(Defendant's Signature)

_____
(Defendant's Name)

_____
(Defendant's Address)

_____
(Defendant's Address)

_____
(Defendant's Telephone Number)

□ *Prepared with the assistance of counsel admitted in New York.*

# VERIFYING, SERVING AND FILING THE ANSWER

## VERIFYING THE ANSWER

The Answer must be verified. When you verify an Answer it means you are swearing to the truth of the Answer, under oath. In order to verify the answer, you must sign the Verification form in front of a notary public, who will also sign the Verification and stamp it with a notary stamp.

## SERVING AND FILING THE ANSWER

You now have a Verified Answer. Make at least two copies of the Verified Answer. After you have served the Verified Answer, you will file the original Answer with the Court with proof of service. You will arrange to have one copy of the Answer "served" on the Plaintiff's attorney. Keep the other copy for your records.

**VERIFICATION**

I, _____, being duly sworn, state that the within Answer is true to the best of my knowledge, except as to those matters alleged upon information and belief, which I believe to be true

_____
(Defendant's Name)

_____
(Defendant's Signature)

Sworn to and subscribed before me this
_____ day of _____, 20_____

_____
Notary Public

# VERIFYING, SERVING AND FILING THE ANSWER (CONTINUED)

How to "serve" the Answer on the Plaintiff's attorney

"Serving" the Answer on the Plaintiff's attorney means mailing the Answer to the attorney's office. The name and address of the Plaintiff's attorney is at the bottom of the Summons.

You may not serve the Answer yourself. Court rules say that the Defendant may not serve his or her own Answer. Someone else must do it for you. This person may not be one of the Defendants in the lawsuit. It may be anyone who is over the age of 18, as long as they are not also a Defendant in the lawsuit.

The best ways to serve the Answer is to send it by certified mail, return receipt requested, or by overnight mail. Be sure to keep a copy of the certified mail receipt, or overnight delivery receipt.

## FILING THE ANSWER WITH THE COURT

The person who served the Verified Answer must fill out a document called an "Affidavit of Service." A form Affidavit of Service is provided with these instructions. The Affidavit of Service must describe the paper that was served, which is the Verified Answer. The Affidavit of Service must state the name and address of the Plaintiff's attorney who was served with the Verified Answer. The Affidavit of Service must state the date on which the Verified Answer was mailed. This form must be signed in front of a Notary Public.

**AFFIDAVIT OF SERVICE**

I,_____, served the within _____

_____on Plaintiff's attorney as follows (*attorney's name and address*):

_____

_____

_____

_____

I served the _____

by the following method (*check all that apply*):

- ☐ first class mail
- ☐ certified mail
- ☐ certified mail, return receipt requested
- ☐ overnight delivery service
- ☐ facsimile
- ☐ personal delivery.

on the _____ day of _____, 20____.

I am eighteen years or older and I am not a Defendant in this lawsuit.

Signature:_____

Print Name:_____

Sworn to and subscribed before me this

_____ day of _____, 20_____

_____

Notary Public

# VERIFYING, SERVING AND FILING THE ANSWER (CONTINUED)

Attach the original Affidavit of Service to the original Verified Answer. Make and keep a copy of the Affidavit of Service for your own records. Keep it with your copy of the Verified Answer. Take the original Verified Answer with the Affidavit of Service to the Supreme Court in your borough or county. Go to the clerk's office and state that you wish to file an Answer to a Foreclosure Complaint.

Be sure to ask the clerk to "date-stamp" both the original document that you are filing and your copy to keep for your records. This way you will have proof of the day you filed your answer stamped right onto your copy and the original filed with the court. If you do this no one will be able to argue with you about the date you filed your Answer.



*Bronx*:
Bronx County Supreme Court
851 Grand Concourse, Bronx
County Clerk's Office, Room 118
(718) 618-1400

*Brooklyn*:
Kings County Supreme Court
360 Adams Street, Brooklyn
County Clerk's Office, basement level,
Room 189, "(Window #12 for cases with a 6-digit index number starting with "5";
Window #9 for all other cases)
(347) 404-9772

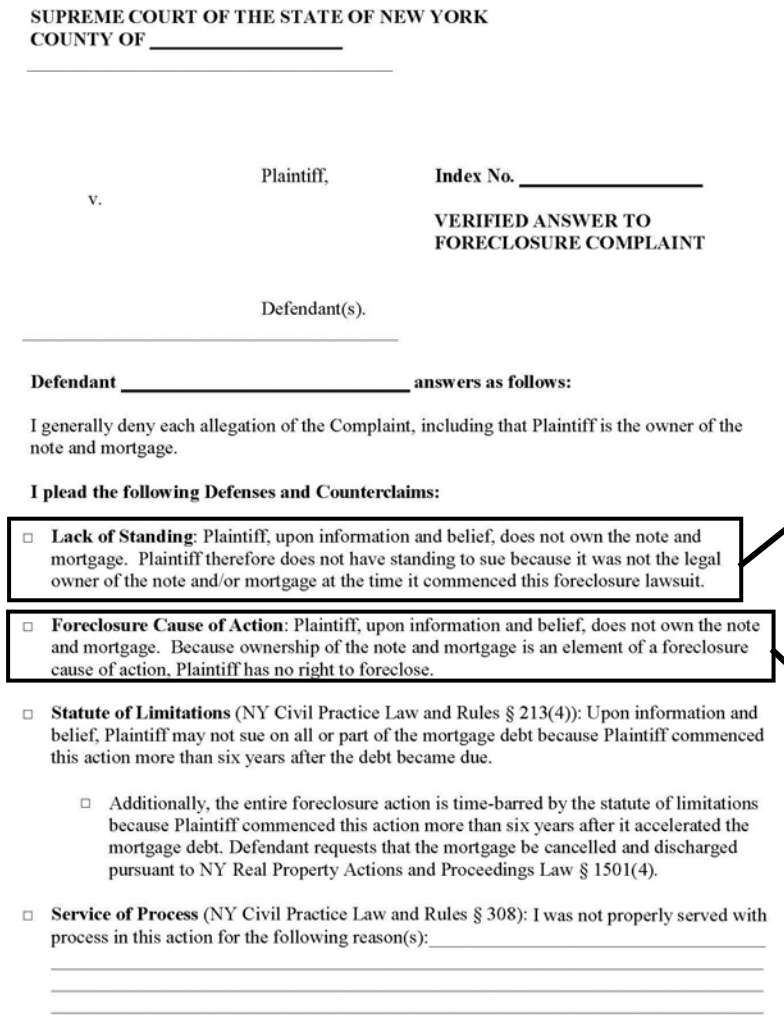
*Manhattan*:
New York County Supreme Court
60 Centre Street, Manhattan
Basement level, Room 141B, go to "Law and Equity" window
(646) 386-5955

*Queens*:
Queens County Supreme Court
88-11 Sutphin Blvd., Jamaica
County Clerk's Office, Room 100
(718) 298-0602

*Staten Island*:
Richmond County Clerk's Office
Office of the Richmond County Clerk
130 Stuyvesant Place, 2nd Floor
(718) 675-7700

# Common Defenses to Foreclosure

**Consult with an attorney or non-profit housing counselor as soon as possible. Think carefully about whether the defenses might apply to you. If you do not include some legal defenses in your Answer, you may lose the right to raise them later.**



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Plaintiff,

v.

Index No. _____

VERIFIED ANSWER TO FORECLOSURE COMPLAINT

Defendant(s).

**Defendant _____ answers as follows:**

I generally deny each allegation of the Complaint, including that Plaintiff is the owner of the note and mortgage.

**I plead the following Defenses and Counterclaims:**

☐ **Lack of Standing**: Plaintiff, upon information and belief, does not own the note and mortgage. Plaintiff therefore does not have standing to sue because it was not the legal owner of the note and/or mortgage at the time it commenced this foreclosure lawsuit.

☐ **Foreclosure Cause of Action**: Plaintiff, upon information and belief, does not own the note and mortgage. Because ownership of the note and mortgage is an element of a foreclosure cause of action, Plaintiff has no right to foreclose.

☐ **Statute of Limitations** (NY Civil Practice Law and Rules § 213(4)): Upon information and belief, Plaintiff may not sue on all or part of the mortgage debt because Plaintiff commenced this action more than six years after the debt became due.

☐ Additionally, the entire foreclosure action is time-barred by the statute of limitations because Plaintiff commenced this action more than six years after it accelerated the mortgage debt. Defendant requests that the mortgage be cancelled and discharged pursuant to NY Real Property Actions and Proceedings Law § 1501(4).

☐ **Service of Process** (NY Civil Practice Law and Rules § 308): I was not properly served with process in this action for the following reason(s):_____

_____

_____

_____

**Lack of Standing:** If you check this box, you are asking the court to make the Plaintiff prove that it was the owner of your mortgage at the time it brought the lawsuit. This is called "standing." If you check this box, the Plaintiff will not be allowed to foreclose on your home unless and until it can prove its "standing." **If you do not check this box now, you may not be able to change your mind and claim later that the Plaintiff is not the owner of your mortgage. If you believe that the Plaintiff was not the owner of your mortgage at the time it brought this lawsuit, you should check this box.**

**Foreclosure Cause of Action:** This defense is similar to the defense of Lack of Standing. But this defense asks the court to make Plaintiff prove that it is the owner of the loan whether or not you have reason to believe that Plaintiff does not own your mortgage.

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# Common Defenses to Foreclosure

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

Plaintiff,

v.

**Index No.** _____

**VERIFIED ANSWER TO FORECLOSURE COMPLAINT**

Defendant(s).

**Defendant** _____ **answers as follows:**

I generally deny each allegation of the Complaint, including that Plaintiff is the owner of the note and mortgage.

**I plead the following Defenses and Counterclaims:**

☐ **Lack of Standing**: Plaintiff, upon information and belief, does not own the note and mortgage. Plaintiff therefore does not have standing to sue because it was not the legal owner of the note and/or mortgage at the time it commenced this foreclosure lawsuit.

☐ **Foreclosure Cause of Action**: Plaintiff, upon information and belief, does not own the note and mortgage. Because ownership of the note and mortgage is an element of a foreclosure cause of action, Plaintiff has no right to foreclose.

☐ **Statute of Limitations** (NY Civil Practice Law and Rules § 213(4)): Upon information and belief, Plaintiff may not sue on all or part of the mortgage debt because Plaintiff commenced this action more than six years after the debt became due.

☐ Additionally, the entire foreclosure action is time-barred by the statute of limitations because Plaintiff commenced this action more than six years after it accelerated the mortgage debt. Defendant requests that the mortgage be cancelled and discharged pursuant to NY Real Property Actions and Proceedings Law § 1501(4).

☐ **Service of Process** (NY Civil Practice Law and Rules § 308): I was not properly served with process in this action for the following reason(s):_____

_____

_____

_____

**Statute of Limitations:** When a mortgage payment is not made, the lender must sue within six years of the missed payment. If the lender does not sue within six years of the missed payment, it is forever barred from suing for that payment.

Also, when a lender brings a foreclosure action, the mortgage debt is "accelerated." This means that the entire debt becomes due, not just the missed payments. The entire debt is the amount of money you originally borrowed plus the missed payments. If a foreclosure action is dismissed or discontinued under certain circumstances, and more than six years have passed since it was first filed, then it is possible that collection of the entire debt is barred by the statute of limitations.

If it has been more than six years since you have made a mortgage payment, you should check this defense.

**Service of Process:** If you believe you were not properly served with the summons and complain in this case, you should check this box and explain why you believe you were not properly served. A summons and complaint is properly served if:

- It was handed to you in person; OR
- If was left at your home or workplace with a person "of suitable age and discretion" AND another copy was mailed to you within 20 days.

If the process server is not able to find you or a person "of suitable age and discretion" at your home or workplace, then the summons and complaint may be attached to the door of your home or workplace. If the papers are attached to your door, then another copy must be mailed to you as well.

# Common Defenses to Foreclosure

- ☐ **Notice of Default**: Plaintiff failed to comply with the requirements for the notice of default in my mortgage loan agreement, a condition precedent to this foreclosure action.
- ☐ **Reverse Mortgage--Notice Requirements:** Plaintiff failed to comply with the notice requirements under New York and/or federal law or failed to comply with contractual requirements of the reverse mortgage, which are conditions precedent to this foreclosure action.
- ☐ **Reverse Mortgage—Failure to Specify Alleged Default**: The complaint is vague and does not specify the alleged default and/or the amount(s) plaintiff claims in this action.
- ☐ **Reverse Mortgage—Foreclosure on a Reverse Mortgage for Property Charge Defaults is Against Public Policy:** The purpose of reverse mortgage loans under the Home Equity Conversion Mortgage ("HECM") program is to assist senior citizens to stay in their homes, and reverse mortgage lenders have other remedies in the event of alleged failure to pay property charges. Plaintiff, accordingly, as a matter of equity and public policy, should not be permitted to foreclose.
- ☐ **90-Day Notice Requirement** (NY Real Property Actions and Proceedings Law § 1304): Plaintiff failed to comply with the requirements of NY Real Property Actions and Proceedings Law § 1304, a condition precedent to this foreclosure action.
- ☐ **90-Day Notice Filing Requirement** (NY Real Property and Proceedings Law § 1306): Plaintiff failed to comply with the requirements of NY Real Property and Proceedings Law § 1306, a condition precedent to this foreclosure action.
- ☐ **Help for Homeowners in Foreclosure Notice Requirement** (NY Real Property Actions and Proceedings Law § 1303): Plaintiff failed to comply with the requirements of NY Real Property and Proceedings Law § 1303, a condition precedent to this foreclosure action.
- ☐ **Pending Foreclosure Action** (NY Real Property Actions and Proceedings Law § 1301): Plaintiff impermissibly commenced this action because there is a prior pending action to recover all or part of the mortgage debt.
- ☐ **Real Estate Settlement Procedures Act Early Intervention Requirement** (12 C.F.R. § 1024.39): Upon information and belief, Plaintiff violated the early intervention requirements of the Real Estate Settlement Procedures Act because (*check one or both if applicable*):
  - ☐ Within 36 days of my delinquency, the loan servicer did not attempt to establish live contact with me to inform me about the availability of loss mitigation options.
  - ☐ Within 45 days of my delinquency, the loan servicer did not send me a written notice that included contact information for the servicer, a description of loss mitigation options available from the servicer, information about applying for loss mitigation, and a website listing housing counselors.

**Notice of Default**: Most mortgages require the lender to send you a notice if the lender believes you are in default of your mortgage. The notice is required to be sent before the lender brings a foreclosure action. You can check your mortgage document to see what type of notice may be required. If your mortgage requires the lender to send you a notice that you are in default of the mortgage, and your lender did not send such a notice, the court may dismiss the foreclosure action. If you did not receive a notice from the lender informing you of your default under the mortgage, then you should check this defense.

**Reverse Mortgage Notice and Other Requirements**: The New York State Department of Financial Services and the United States Department of Housing and Urban Development ("HUD") have rules regarding reverse mortgage foreclosures. NY rules state that when a lender seeks to foreclose on a reverse mortgage because the homeowner is not paying property taxes and/or insurance, then the lender must first send the homeowner a written notice. The notice must state that failure to make such payments can lead to termination of the mortgage. The notice must also state that the homeowner has the right to cure the default by making the payments. The lender must give the homeowner 30 days to cure the default by making the payments. HUD Rules state that prior approval from HUD to accelerate the loan is required, which is known as a condition precedent and is considered a requirement under the note and mortgage. If you have a reverse mortgage that is being foreclosed for failure to pay taxes and/or insurance, and you did not receive the notice described above, or if you believe that the plaintiff did not comply with HUD Rules or the terms of your note and mortgage, you should check this defense.

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- ☐ **Reverse Mortgage—Failure to Specify Alleged Default**: The complaint is vague and does not specify the alleged default and/or the amount(s) plaintiff claims in this action.
- ☐ **Reverse Mortgage—Foreclosure on a Reverse Mortgage for Property Charge Defaults is Against Public Policy:** The purpose of reverse mortgage loans under the Home Equity Conversion Mortgage ("HECM") program is to assist senior citizens to stay in their homes, and reverse mortgage lenders have other remedies in the event of alleged failure to pay property charges. Plaintiff, accordingly, as a matter of equity and public policy, should not be permitted to foreclose.
- ☐ **90-Day Notice Requirement** (NY Real Property Actions and Proceedings Law § 1304): Plaintiff failed to comply with the requirements of NY Real Property Actions and Proceedings Law § 1304, a condition precedent to this foreclosure action.
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- ☐ **Help for Homeowners in Foreclosure Notice Requirement** (NY Real Property Actions and Proceedings Law § 1303): Plaintiff failed to comply with the requirements of NY Real Property and Proceedings Law § 1303, a condition precedent to this foreclosure action.
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  - ☐ Within 36 days of my delinquency, the loan servicer did not attempt to establish live contact with me to inform me about the availability of loss mitigation options.
  - ☐ Within 45 days of my delinquency, the loan servicer did not send me a written notice that included contact information for the servicer, a description of loss mitigation options available from the servicer, information about applying for loss mitigation, and a website listing housing counselors.

**Reverse Mortgage Failure to Specify Alleged Default:** If the complaint is vague and does not explain the nature of your default or tell you how much is owed, you should check this defense.

**Reverse Mortgage Foreclosure on o a Reverse Mortgage for Property Charge Defaults is Against Public Policy:** This defense asserts that the purpose of reverse mortgage loans is to assist senior citizens to stay in their homes, and that reverse mortgage lenders are given other remedies in the event of alleged failure to pay property charges and therefore should not be permitted to foreclose.

**90-Day Notice Requirement**: Your lender was required to send you a notice 90 days before starting this foreclosure action. This 90-Day Notice must be sent by regular mail *and* certified mail. Also, the lender must send *two* copies of the Notice. The Notice must state "YOU COULD LOSE YOUR HOME." The Notice must also state the number of days your mortgage payments are late and the amount of money you need to pay to catch up. The Notice must also include a list of housing counselors or legal service providers that offer help to homeowners without charge.

You should check this box if you did not receive *two* copies of this 90-Day Notice. You should check this box if the 90-Day Notice did not include the information described above. You should check this box if the foreclosure case was started against you before 90 days had passed after you received the 90-Day Notice.

# Common Defenses to Foreclosure

- ☐ **Notice of Default**: Plaintiff failed to comply with the requirements for the notice of default in my mortgage loan agreement, a condition precedent to this foreclosure action.
- ☐ **Reverse Mortgage--Notice Requirements:** Plaintiff failed to comply with the notice requirements under New York and/or federal law or failed to comply with contractual requirements of the reverse mortgage, which are conditions precedent to this foreclosure action.
- ☐ **Reverse Mortgage—Failure to Specify Alleged Default**: The complaint is vague and does not specify the alleged default and/or the amount(s) plaintiff claims in this action.
- ☐ **Reverse Mortgage—Foreclosure on a Reverse Mortgage for Property Charge Defaults is Against Public Policy:** The purpose of reverse mortgage loans under the Home Equity Conversion Mortgage ("HECM") program is to assist senior citizens to stay in their homes, and reverse mortgage lenders have other remedies in the event of alleged failure to pay property charges. Plaintiff, accordingly, as a matter of equity and public policy, should not be permitted to foreclose.
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  - ☐ Within 36 days of my delinquency, the loan servicer did not attempt to establish live contact with me to inform me about the availability of loss mitigation options.
  - ☐ Within 45 days of my delinquency, the loan servicer did not send me a written notice that included contact information for the servicer, a description of loss mitigation options available from the servicer, information about applying for loss mitigation, and a website listing housing counselors.

**90-Day Notice Filing Requirement**: The law requires that your lender file a copy of the 90-Day Notice with the Department of Financial Services. This filing must be made within three business days after the lender mailed the Notice to you. The law also requires the lender to state in the foreclosure complaint (the document that you are answering) that it filed the 90-Day Notice with the Department of Financial Services within the time period required. You should check this box if the Complaint does not state that the lender filed the Notice with the Department of Financial Services within three days of mailing the Notice to you. You should also check this box if you have a reason to believe that the lender did not file the Notice, even though the Complaint says the lender filed the Notice.

**Help for Homeowners in Foreclosure Notice Requirement:** The law requires that your lender include a special notice with the foreclosure summons and complaint that is served on you. This special notice is called "Help for Homeowners in Foreclosure." The notice must be printed in bold, large type. The notice must be on colored paper. You should check this box if the foreclosure summons and complaint you received did not include this special notice in large bold type on colored paper.

**Pending Foreclosure Action**: The law does not allow a party to bring a lawsuit when there is already a lawsuit involving the same parties and issues. You should check this box if (1) your lender started a different foreclosure action before it started the case that you are responding to, and (2) that earlier foreclosure action is still before the court because it has not been dismissed or discontinued.

# Common Defenses to Foreclosure

- ☐ **Notice of Default**: Plaintiff failed to comply with the requirements for the notice of default in my mortgage loan agreement, a condition precedent to this foreclosure action.
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  - ☐ Within 36 days of my delinquency, the loan servicer did not attempt to establish live contact with me to inform me about the availability of loss mitigation options.
  - ☐ Within 45 days of my delinquency, the loan servicer did not send me a written notice that included contact information for the servicer, a description of loss mitigation options available from the servicer, information about applying for loss mitigation, and a website listing housing counselors.

**Real Estate Settlement Procedures Act Early Intervention Requirement**: Federal law requires your lender to reach out to you when you are behind on mortgage payments. The lender must provide you with information about your options, such as a loan modification or short sale. The lender must perform this outreach before it may bring a foreclosure action. You should check this box if your lender did not contact you to discuss your options before bringing the foreclosure action.

# Common Defenses to Foreclosure

- ☐ **Real Estate Settlement Procedures Act Pre-Foreclosure Review Requirement** (12 C.F.R. § 1024.41): Plaintiff impermissibly filed this foreclosure during the pre-foreclosure review period because (*check one or both if applicable*):
  - ☐ Plaintiff commenced this action before my loan was more than 120 days delinquent.
  - ☐ I submitted a complete loss mitigation application to my loan servicer but Plaintiff commenced this action (1) before the loan servicer made a decision on that application, (2) before the time period to appeal the loan servicer's decision lapsed, or (3) before the loan servicer made a decision on an appeal I submitted in connection with the loss mitigation application.
- ☐ **FHA Pre-Foreclosure Requirements**: My loan is insured by the Federal Housing Administration. Upon information and belief, the loan servicer/mortgagee has not complied with regulations of the Department of Housing and Urban Development because the loan servicer/mortgagee did not do one or more of the following (*check all that are applicable*):
  - ☐ Send me a notice of default before the end of the second month of my delinquency (24 C.F.R. § 203.602).
  - ☐ Attempt to arrange a face-to-face interview with me before three full monthly installments due under the mortgage were unpaid (24 C.F.R. § 203.604).
  - ☐ Evaluate me for loss mitigation before four full monthly installments due under the mortgage were unpaid (24 C.F.R. § 203.605).
  - ☐ Wait until three full monthly installments due under the mortgage were unpaid before commencing this foreclosure action (24 C.F.R. § 203.606)
- ☐ **Certificate of Merit Requirement** (NY Civil Practice Law and Rules § 3012-b): Upon information and belief, Plaintiff failed to comply with the Certificate of Merit requirements of NY Civil Practice Law and Rules § 3012-b.
- ☐ **Request for Judicial Intervention** (NY Codes, Rules and Regulations Title 22, § 202.12-a(b)): Upon information and belief, Plaintiff did not file a Request for Judicial Intervention.
- ☐ **Attorney's Fees** (NY Real Property Law § 282): If I retain counsel, I am entitled to recover my attorney's fees in defending this action pursuant to New York Real Property Law § 282.
- ☐ **Excessive Interest and Fees** (NY Civil Practice Law and Rules § 3408(f)): In a prior foreclosure action, Plaintiff failed to negotiate in good faith pursuant to CPLR 3408(f). This failure to negotiate in good faith has caused excessive interest and fees to accrue which Plaintiff, as a matter of equity and by operation of the CPLR, is not entitled to recover.
- ☐ **Excessive Interest** (NY Civil Practice Law and Rules § 5001(a)): Plaintiff has unreasonably delayed filing this action, failed to file the Request for Judicial Intervention or engaged in

**Real Estate Settlement Procedures Act Pre-Foreclosure Review Requirement**: Under federal law, a lender may not start a foreclosure case before the loan is more than 120 days overdue. Also, under federal law a lender may not start a foreclosure case if you have applied for a loan modification and the lender has not yet decided whether to approve or deny it. It also may not start a foreclosure case if there is still time to appeal a denial. Or, if you have appealed the denial but the lender has not yet decided the appeal. If your loan is less than 120 days overdue, you should check this defense. Also, if you had a loan modification or short sale application with the lender at the time this foreclosure case was filed, you should check this defense.

**FHA Pre-Foreclosure Requirements:** There are special rules that apply to FHA loans. You will know if your loan is an FHA loan because your Note and Mortgage will contain an FHA case number on the first page. Also, your monthly mortgage statements will show an FHA case number. If your loan is not an FHA loan then do not complete this section.

FHA lenders must perform certain acts before they may start a foreclosure case. These acts are: (1) the lender must send the borrower a notice of default before the end of the second month in which a payment is not received; (2) the lender must try to arrange an in-person interview with the borrower before the borrower misses three monthly payments; and (3) the lender must evaluate the borrower for loss mitigation options before the borrower misses four monthly payments. Also, the lender on an FHA loan may not bring a foreclosure case until the loan payments are behind by three full months. If your lender did not send a notice of default, did not attempt to arrange a face-to-face interview with, or did not evaluate you for a loan modification or short sale, then you should check this defense. You should also check this defense if the foreclosure case was filed before you missed three full monthly payments.

# Common Defenses to Foreclosure

- ☐ **Real Estate Settlement Procedures Act Pre-Foreclosure Review Requirement** (12 C.F.R. § 1024.41): Plaintiff impermissibly filed this foreclosure during the pre-foreclosure review period because (*check one or both if applicable*):
  - ☐ Plaintiff commenced this action before my loan was more than 120 days delinquent.
  - ☐ I submitted a complete loss mitigation application to my loan servicer but Plaintiff commenced this action (1) before the loan servicer made a decision on that application, (2) before the time period to appeal the loan servicer's decision lapsed, or (3) before the loan servicer made a decision on an appeal I submitted in connection with the loss mitigation application.
- ☐ **FHA Pre-Foreclosure Requirements**: My loan is insured by the Federal Housing Administration. Upon information and belief, the loan servicer/mortgagee has not complied with regulations of the Department of Housing and Urban Development because the loan servicer/mortgagee did not do one or more of the following (*check all that are applicable*):
  - ☐ Send me a notice of default before the end of the second month of my delinquency (24 C.F.R. § 203.602).
  - ☐ Attempt to arrange a face-to-face interview with me before three full monthly installments due under the mortgage were unpaid (24 C.F.R. § 203.604).
  - ☐ Evaluate me for loss mitigation before four full monthly installments due under the mortgage were unpaid (24 C.F.R. § 203.605).
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- ☐ **Excessive Interest and Fees** (NY Civil Practice Law and Rules § 3408(f)): In a prior foreclosure action, Plaintiff failed to negotiate in good faith pursuant to CPLR 3408(f). This failure to negotiate in good faith has caused excessive interest and fees to accrue which Plaintiff, as a matter of equity and by operation of the CPLR, is not entitled to recover.
- ☐ **Excessive Interest** (NY Civil Practice Law and Rules § 5001(a)): Plaintiff has unreasonably delayed filing this action, failed to file the Request for Judicial Intervention or engaged in

**Certificate of Merit Requirement**: Under state law, the attorney for the lender must include with the foreclosure Complaint a "Certificate of Merit." The Certificate of Merit must state under oath the following: (1) the attorney for the lender has reviewed the facts of the case; (2) the attorney for the lender has consulted with an identified representative of the lender; (3) there is a reasonable basis for starting the foreclosure case; and (4) the plaintiff in the case is the creditor who is entitled to enforce the Note and Mortgage. A copy of the Note and Mortgage must be attached to the Certificate of Merit or the Complaint. If the Note and Mortgage are not attached, there must be an affidavit that the documents were lost. If there is no Certificate of Merit with the foreclosure Complaint, or if the Certificate does not contain the statements described above, or if copies of the Note and Mortgage were not provided, you should check this defense.

**Request for Judicial Intervention:** The lender must file with the clerk of court a Request for Judicial Intervention (RJI). The RJI is the document that activates the case in the court's case management system. The RJI is the document that will get your case into a settlement conference, where you will have the opportunity to negotiate a solution to the case that keeps you in the home. The lender must file the RJI at the same time it files proof that it served the Summons and Complaint on you. If you have reason to believe that the lender did not file an RJI—for example, because you did not receive a copy of the RJI—then you should check this defense.

# Common Defenses to Foreclosure

- ☐ **Real Estate Settlement Procedures Act Pre-Foreclosure Review Requirement** (12 C.F.R. § 1024.41): Plaintiff impermissibly filed this foreclosure during the pre-foreclosure review period because (*check one or both if applicable*):
  - ☐ Plaintiff commenced this action before my loan was more than 120 days delinquent.
  - ☐ I submitted a complete loss mitigation application to my loan servicer but Plaintiff commenced this action (1) before the loan servicer made a decision on that application, (2) before the time period to appeal the loan servicer's decision lapsed, or (3) before the loan servicer made a decision on an appeal I submitted in connection with the loss mitigation application.
- ☐ **FHA Pre-Foreclosure Requirements**: My loan is insured by the Federal Housing Administration. Upon information and belief, the loan servicer/mortgagee has not complied with regulations of the Department of Housing and Urban Development because the loan servicer/mortgagee did not do one or more of the following (*check all that are applicable*):
  - ☐ Send me a notice of default before the end of the second month of my delinquency (24 C.F.R. § 203.602).
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- ☐ **Excessive Interest and Fees** (NY Civil Practice Law and Rules § 3408(f)): In a prior foreclosure action, Plaintiff failed to negotiate in good faith pursuant to CPLR 3408(f). This failure to negotiate in good faith has caused excessive interest and fees to accrue which Plaintiff, as a matter of equity and by operation of the CPLR, is not entitled to recover.
- ☐ **Excessive Interest** (NY Civil Practice Law and Rules § 5001(a)): Plaintiff has unreasonably delayed filing this action, failed to file the Request for Judicial Intervention or engaged in other dilatory conduct causing excessive interest to accrue which the Court may reduce or toll, as a matter of equity and by operation of the CPLR.

**Attorney's Fees**: When a borrower hires an attorney to defend a foreclosure action, the lender must pay the borrower's attorney's fees if the defense is successful. You should check this defense even if you have not yet hired an attorney, if you think you may be hiring an attorney. You should also check this defense if you think you may be obtaining free legal services from a non-profit organization. The law allows non-profit attorneys to be reimbursed for the value of their work even if they do not charge their clients.

**Excessive Interest and Fees**: The law states that a lender must negotiate in good faith for a possible loan modification. The law also states that when a lender unreasonably delays a foreclosure case it should not be allowed to recover all of the interest and fees that accumulated during the delay. If this is not the first foreclosure case filed against you, and you think the lender failed to negotiate in good faith in the prior foreclosure action, then you should check this defense. Examples of failing to negotiate in good faith include the lender taking too long to process a loan modification application and the lender unreasonably denying your loan modification application.

**Excessive Interest**: You should check this defense if: (1) the lender waited too long to file a foreclosure case against you; (2) the lender did not file the Request for Judicial Intervention on time; or (3) the lender in any other way delayed enforcing its rights under the mortgage.

# Common Defenses to Foreclosure

other dilatory conduct causing excessive interest to accrue which the Court may reduce or toll, as a matter of equity and by operation of the CPLR.

☐ **Action Commenced Against a Deceased Party**: This action is a nullity because it was commenced against Defendant _____ after that party was already deceased and before a personal representative was appointed and it should therefore be dismissed.

☐ **Payment or Partial Payment:** I have paid, in whole or in part, the amounts claimed by Plaintiff.

☐ **Other Defenses or Counterclaims** (*attach additional pages if needed*):

Wherefore, Defendant requests that the Complaint be dismissed; that the relief requested by Defendant be granted in its entirety; that Defendant be granted costs and attorneys' fees if he

**Action Commenced Against a Deceased Party:** The law states that a dead person cannot be sued. Any lawsuit against a dead person is a nullity. If the borrower in this case is deceased, and the lender sued this person after his death, then you should check this defense. The borrower is the person who signed the Note.

**Payment or Partial Payment:** If you contend that you have paid the amounts demanded by Plaintiff, either in whole or in part, you should check this defense.

# Other Facts Concerning Your Mortgage, Your Home, or Other Defenses:

In this section of the Answer, you should add any additional information or defenses that you believe the judge should know about your case. In some cases, the court may decide that a mortgage loan is illegal because the closing or sales process and/or the mortgage loan terms were fundamentally unfair. You should use this section to explain any of the reasons why you think your loan was unfair or any other information about your loan that you think the judge should know.

Some examples of the types of information you might want to include in this section are:

- □ You were pressured to sign the mortgage or home purchase documents.
- □ You were discouraged from using your own attorney or appraiser or other independent advisor.
- □ You did not receive a financial benefit from your mortgage.
- □ The interest rate is extremely high, or higher than you qualified for given your credit history.
- □ You were charged high closing costs or fees.



# Tell your Story

- □ You believe that a mortgage broker, lender, or other person involved with your mortgage intentionally made false statements to you that led you to believe that you would get a better deal on your mortgage or home purchase than you actually received.
- □ Your loan application was falsified (e.g., your income was misstated).
- □ You were misled about what your total mortgage amount, monthly payments, or interest rate would be.
- □ You were told that your interest rate would be fixed but it is an adjustable-rate mortgage (ARM).
- □ You were misled about how high the monthly payments on your adjustable-rate mortgage (ARM) would become.
- □ You were told that utilities, medical expenses, or other bills would be paid off by your mortgage, but they weren't.
- □ You were told that your house was worth more than its actual value (fraudulently over-appraised).

**Be as specific as possible**
Explain the **"who, what, where, when"** of misrepresentations or fraud.

- □ Your home was in poor condition when you purchased it and you were promised repairs that were never made.
- □ You were falsely told that you could earn rental income from your home to help pay the mortgage.
- □ You believe that you were targeted for an unfair or abusive mortgage loan based on your race, national origin, sex, mental or physical disability, age, alienage/citizenship status, or other legally protected characteristic

December 2016

Prepared by:

Legal Services NYC

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF _____**

Plaintiff,

v.

Defendant(s).

**Index No. _____**

**VERIFIED *PRO SE* ANSWER TO FORECLOSURE COMPLAINT**
**☐ AND COUNTERCLAIMS**
[Defendant: check this box if you checked any item in the "counterclaim" section below]

**Defendant _____, *Pro Se*, answers the complaint in this proceeding as follows:**

I generally deny each allegation of the Complaint, including any allegation that Plaintiff is the owner of the note and mortgage.

**I plead the following Defenses and Counterclaims:**

**DEFENSES**

☐ **Lack of Standing**: Plaintiff, upon information and belief, was not the legal owner of the note and/or mortgage, and did not otherwise have the right to enforce the mortgage, at the time it commenced this foreclosure lawsuit and therefore lacks standing.

☐ **Foreclosure Cause of Action**: Plaintiff has not pleaded that it owns the note and mortgage, which is an element of a foreclosure cause of action, and it therefore has failed to plead a foreclosure cause of action.

☐ **Statute of Limitations** (NY Civil Practice Law and Rules § 213(4)): Plaintiff may not sue on all or part of the mortgage debt because Plaintiff, upon information and belief, commenced this action more than six years after the debt became due, which defense also supports the separately pleaded counterclaim to cancel and discharge the mortgage under NY Real Property Actions and Proceedings Law § 1501(4).

☐ **Service of Process** (NY Civil Practice Law and Rules § 308): I was not properly served with process in this action for the following reason(s):_____

_____

_____

_____

☐ **Prior Pending Action** (NY Real Property Actions and Proceedings Law § 1301): Plaintiff impermissibly commenced this action because there is a prior pending action to recover all or part of the mortgage debt.

☐ **No Default/Payment or Partial Payment**: I have paid, in whole or in part, the amounts claimed by Plaintiff, or the amounts claimed by Plaintiff are not due, or the loan is otherwise not in default.

**Reverse Mortgages**

☐ **Reverse Mortgage--Notice Requirements:** Plaintiff failed to comply with the notice requirements under New York and/or federal law or failed to comply with contractual requirements of the reverse mortgage, which are conditions precedent to this foreclosure action.

☐ **Reverse Mortgage—Failure to Specify Alleged Default**: The complaint is vague and does not specify the alleged default and/or the amount(s) plaintiff claims in this action.

☐ **Reverse Mortgage—Foreclosure on a Reverse Mortgage for Property Charge Defaults is Against Public Policy:** The purpose of reverse mortgage loans under the Home Equity Conversion Mortgage ("HECM") program is to assist senior citizens to stay in their homes, and reverse mortgage lenders have other remedies in the event of alleged failure to pay property charges. Plaintiff, accordingly, as a matter of equity and public policy, should not be permitted to foreclose.

☐ **Reverse Mortgage—NY Real Property Law § 280-b:** Plaintiff and/or its predecessor-in interest, upon information and belief, violated the requirements of NY Real Property Law § 280-b, compliance with which is a condition precedent to commencing an action to foreclose on a reverse mortgage loan covered by that statute, mandating dismissal of this foreclosure action, which defense also supports the separately pleaded counterclaim for damages under NY Real Property Law § 280-b.

**Predicate Notices/Conditions Precedent**

☐ **Notice of Default**: Plaintiff failed to comply with the requirements for the notice of default in my mortgage loan agreement, a condition precedent to this foreclosure action.

☐ **90-Day Notice Requirement** (NY Real Property Actions and Proceedings Law § 1304): Plaintiff failed to comply with the requirements of NY Real Property Actions and Proceedings Law § 1304, a condition precedent to this foreclosure action.

☐ **90-Day Notice Filing Requirement (**NY Real Property and Proceedings Law § 1306): Plaintiff failed to comply with the requirements of NY Real Property and Proceedings Law § 1306, a condition precedent to this foreclosure action.

☐ **Help for Homeowners in Foreclosure Notice Requirement** (NY Real Property Actions and Proceedings Law § 1303): Plaintiff failed to comply with the requirements of NY Real Property and Proceedings Law § 1303, a condition precedent to this foreclosure action.

## Real Estate Settlement Procedures Act

☐ **Real Estate Settlement Procedures Act Early Intervention Requirement** (12 C.F.R. § 1024.39): Upon information and belief, Plaintiff violated the early intervention requirements of the Real Estate Settlement Procedures Act because (*check one or both if applicable*):

- ☐ Within 36 days of my delinquency, the loan servicer did not attempt to establish live contact with me to inform me about the availability of loss mitigation options.

- ☐ Within 45 days of my delinquency, the loan servicer did not send me a written notice that included contact information for the servicer, a description of loss mitigation options available from the servicer, information about applying for loss mitigation, and a website listing housing counselors.

☐ **Real Estate Settlement Procedures Act Pre-Foreclosure Review Requirement** (12 C.F.R. § 1024.41): Plaintiff impermissibly filed this foreclosure during the pre-foreclosure review period because (*check one or both if applicable*):

- ☐ Plaintiff commenced this action before my loan was more than 120 days delinquent.

- ☐ I submitted a complete loss mitigation application to my loan servicer but Plaintiff commenced this action (1) before the loan servicer made a decision on that application, (2) before the time period to appeal the loan servicer's decision lapsed, or (3) before the loan servicer made a decision on an appeal I submitted in connection with the loss mitigation application.

## FHA-Insured Loans

☐ **FHA Pre-Foreclosure Requirements**: My loan is insured by the Federal Housing Administration. Upon information and belief, the loan servicer/mortgagee has not complied

with regulations of the Department of Housing and Urban Development because the loan servicer/mortgagee did not do one or more of the following (*check all that are applicable*):

☐ Send me a notice of default before the end of the second month of my delinquency (24 C.F.R. § 203.602).

☐ Attempt to arrange a face-to-face interview with me before three full monthly installments due under the mortgage were unpaid (24 C.F.R. § 203.604).

☐ Evaluate me for loss mitigation before four full monthly installments due under the mortgage were unpaid (24 C.F.R. § 203.605).

☐ Wait until three full monthly installments due under the mortgage were unpaid before commencing this foreclosure action (24 C.F.R. § 203.606).

******

☐ **Certificate of Merit Requirement** (NY Civil Practice Law and Rules § 3012-b): Upon information and belief, Plaintiff failed to comply with the Certificate of Merit requirements of NY Civil Practice Law and Rules § 3012-b.

☐ **Request for Judicial Intervention** (NY Codes, Rules and Regulations Title 22, § 202.12-a(b)): Upon information and belief, Plaintiff did not file a Request for Judicial Intervention.

☐ **Excessive Interest and Fees** (NY Civil Practice Law and Rules § 3408(f)): In a prior foreclosure action, Plaintiff failed to negotiate in good faith pursuant to CPLR 3408(f). This failure to negotiate in good faith has caused excessive interest and fees to accrue which Plaintiff, as a matter of equity and by operation of the CPLR, is not entitled to recover.

☐ **Excessive Interest** (NY Civil Practice Law and Rules § 5001(a)): Plaintiff has unreasonably

delayed filing this action, failed to file the Request for Judicial Intervention or engaged in other dilatory conduct causing excessive interest to accrue which the Court may reduce or toll, as a matter of equity and pursuant to NY Civil Practice Law and Rules § 5001(a).

☐ **Action Commenced Against a Deceased Party**: This action is a nullity because it was commenced against _____after that party was already deceased and before a personal representative was appointed and it should therefore be dismissed.

☐ **Failure to Join Necessary Party:** This action should be dismissed because of Plaintiff's failure to join a necessary party.

☐ **Coronavirus Foreclosure Moratoriums/Forbearance and Loss Mitigation Programs:** Plaintiff failed to comply with federal or New York State law requiring forbearance and loss mitigation programs for borrowers affected or impacted by the Coronavirus pandemic, or it commenced this action in violation of federal or New York State law imposing moratoriums on the commencement of residential foreclosure actions, or otherwise in violation of any applicable Executive Order promulgated by the Governor of the State of New York or Administrative Orders promulgated by the Chief Administrative Judge of the State of New York.

**Equitable Defenses**

☐ **Unclean Hands and/or Unconscionability:** This action is barred by the doctrine of unclean hands and/or unconscionability for the following reason(s):

_____

_____

_____

_____

☐ **Implied Covenant of Good Faith and Fair Dealing:** Plaintiff or its predecessor-in-interest violated the covenant of good faith and fair dealing implied in all contracts and is barred from recovery in this action for the following reason(s):_____

☐ **Other Defenses or Counterclaims** (*attach additional pages if needed*):

**COUNTERCLAIMS**

☐ Q**uiet Title/Cancel and Discharge the Mortgage**: The statute of limitations for commencement of this foreclosure action on the subject mortgage has expired because Plaintiff, upon information and belief, commenced this action more than six years after it accelerated the mortgage debt. Plaintiff is not in possession of the mortgaged property and I am the owner of the

property and therefore am entitled to a judgment cancelling and discharging the mortgage and adjudging the property free of any encumbrance by such mortgage pursuant to NY Real Property Actions and Proceedings Law § 1501(4).

☐ **Violations of NY Real Property Law § 280-b:** I have been injured by reason of Plaintiff's and/or its predecessor-in-interest's violations of NY Real Property Law § 280-b or the rules and regulations of the federal Department of Housing and Urban Development relating to the home equity conversion mortgage program and I am therefore entitled to recover treble and actual damages, in addition to reasonable attorneys' fees if I retain an attorney, in an amount to be proven at trial.

☐ **Attorney's Fees** (NY Real Property Law § 282): If I retain counsel, I am entitled to recover my attorney's fees in defending this action pursuant to New York Real Property Law § 282.

Wherefore, Defendant requests that the Complaint be dismissed; that judgment in favor of Defendant be granted on Defendant's counterclaims in their entirety; that Defendant be granted costs and attorneys' fees if he or she retains counsel; and that Defendant be granted any other relief allowed by law or equity as this Court shall deem just and proper.

Dated: _____, New York

_____, 20_____

_____, Defendant *Pro Se*

(Defendant's Signature)_____

(Defendant's Name)_____

(Defendant's Address)_____

(Defendant's Address)_____

(Defendant's Telephone Number)_____

☐ *Prepared with the assistance of counsel admitted in New York.*

## VERIFICATION

I, _____, being duly sworn, state that the within Answer is true to the best of my knowledge, except as to those matters alleged upon information and belief, which I believe to be true

_____
(Defendant's Signature)

Sworn to and subscribed before me this
_____ day of _____, 20_____

_____
Notary Public

# AFFIDAVIT OF SERVICE

I,_____ , served the within _____

_____on Plaintiff's attorney as follows (*attorney's name and address*):

_____

_____

_____

_____

I served the _____
by the following method (*check all that apply)*:

☐ first class mail
☐ certified mail
☐ certified mail, return receipt requested
☐ overnight delivery service
☐ facsimile
☐ personal delivery.

on the _____ day of _____, 20____.

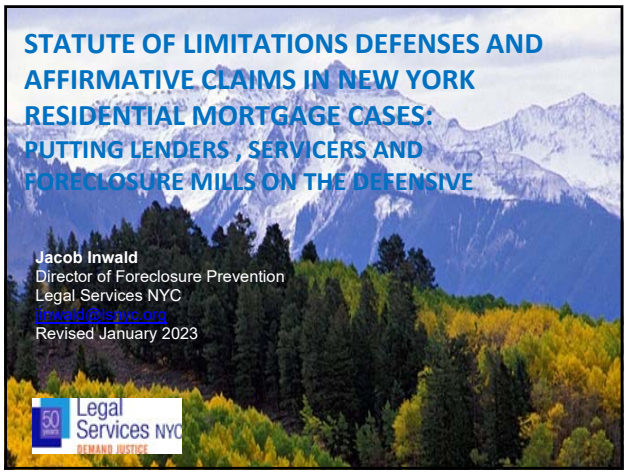
I am eighteen years or older and I am not a Defendant in this lawsuit.

Signature:_____

Print Name:_____

Sworn to and subscribed before me this
_____ day of _____, 20_____

_____
Notary Public




1

## Statute of Limitations as a Shield *and* a Sword

- Used defensively: defeats foreclosure action
- Used offensively: clear title by securing discharge of mortgage where claim to enforce mortgage is time barred based on earlier acceleration
- FDCPA angle: threats to sue on time-barred debt
- Lots of issues for litigation: Acceleration, Revocation of Acceleration; Tolling of statute of limitations
- Stakes are high: plaintiffs' bar is not rolling over, appeals are resulting, and some judges doing crazy things to avoid awarding a "free house."
- Should we be defensive about getting clients a "free house"? Answer: Hell no! Lender has a remedy, and it is called malpractice.

Legal Services NYC DEMAND JUSTICE

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## Some NY Background: Why is Statute of Limitations even in play?

- Lengthy Judicial Foreclosure Process; at start of crisis consumer protections enacted: Pre-Foreclosure Notices, Settlement Conferences
- Robo-Signing Scandals: additional certification requirements; "Shadow Dockets" and Law Firm Closings/Transfers
- Technical and Substantive Defenses: dismissals and voluntary discontinuances of many cases
- Uncured defaults many years later
- New cases filed present with statute of limitations issues

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## The Statute of Limitations for Mortgages in New York

"The following actions must be commenced within **six years**: . . . an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein."

NY CPLR § 213(4).

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## When the Statute of Limitations Begins Running

The six-year statute of limitations begins to run:

- from the due date for *each* unpaid installment; or
- the time the mortgagee is entitled to demand full payment; or
- when the mortgage has been *accelerated* by a proper demand; or
- when a foreclosure action is brought.

*See, e.g., Saini v. Cinelli Enterprises Inc.*, 289 A.D.2d 770, 771, 733 N.Y.S.2d 824, 826 (3d Dep't 2001).

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## When the Statute Begins Running on Installment Payments

"[F]or any mortgage payable in installments, there are **separate causes of action for each installment accrued**, and the Statute of Limitations begins to run, on the date each installment becomes due."

*Loiacono v. Goldberg*, 240 A.D.2d 476, 477, 658 N.Y.S.2d 138 (2d Dep't 1997).

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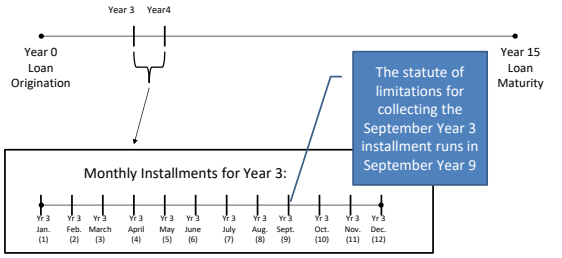
## When the Statute Begins Running on Installment Payments

For most mortgages, the installments (i.e., mortgage payments) come due each month.

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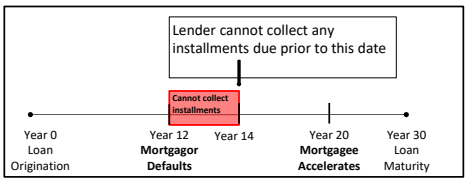
## When the Statute Begins Running on Installment Payments

Where the entire mortgage has not yet come due, a lender will be barred from collecting principal and interest payments that accrued more than six years prior to acceleration or the commencement of the foreclosure action.

*See, e.g., Wells Fargo Bank, N.A. v. Cohen*, 80 A.D.3d 753, 754, 915 N.Y.S.2d 569, 571 (2d Dep't 2010); *Khoury v. Alger*, 174 A.D.2d 918, 919, 571 N.Y.S.2d 829 (3rd Dep't 1991).

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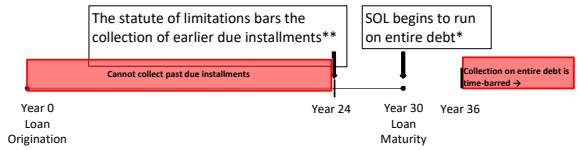
## When the Statute Begins Running on the Entire Mortgage Debt

The statute of limitations begins to run on the entire debt* upon the loan's maturity. *See Quackenbush v. Mapes*, 123 A.D. 242, 107 N.Y.S. 1047 (1st Dep't 1908).




* Included in "entire debt" is the unpaid principal balance and installments that came due within the past six years.
**This assumes that the loan has not been already accelerated.

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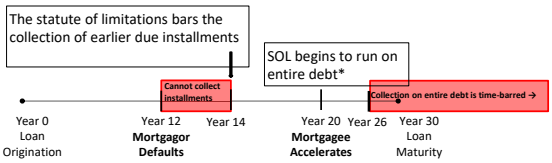
## When the Statute Begins Running on the Entire Mortgage Debt

The statute of limitations begins to run on the entire debt* "**[o]nce the mortgage debt is accelerated.**"

*Loiacono v. Goldberg*, 240 A.D.2d 476, 477, 658 N.Y.S.2d 138 (2d Dep't 1997).




* Included in "entire debt" is the unpaid principal balance and installments that came due within past six years.

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## Reverse Mortgages SOL?

The statute of limitations for **reverse mortgages** begins to run <u>when the triggering event occurs.</u>

"Defendant established that, pursuant to the mortgage agreement, 'the principal sum and interest shall become due upon,' inter alia, the death of the mortgagor, i.e., decedent, which occurred on May 12, 2006, and that defendant received a notice of default and demand for payment sent from a nonparty that serviced the mortgage on June 29, 2006. '[T]he statute of limitations . . . was triggered when the party that was owed money had the right to demand payment, not when it actually made the demand' (*Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 771 [2012])."

*Wendover Fin. Servs. v. Ridgeway*, 137 A.D.3d 1718, 1719, 28 N.Y.S.3d 535 (4th Dep't 2016).

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## Reverse Mortgage SOL?

- But see: *RCR Servs. Inc. v. Herbil Holding* Co., 229 A.D.2d 379, 380, 645 N.Y.S.2d 76, 77 (2d Dep't 1996) (federal government not bound by statutes of limitation, and because ultimate benefit from foreclosure on HECM mortgage inures to federal government, plaintiff assignee of HUD was entitled to HUD's immunity from statute of limitations.
- Also see Windward Bora LLC v. Wilmington Savings Fund Society, FSB, 982 F.3d 139 (2nd Cir., NY).

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## What Constitutes Acceleration?

"An election to accelerate the mortgage must consist of a notice of election to the mortgagor **or** some overt act manifesting such an election."

*Goldman Sachs Mortgage Co. v. Mares*, 45 Misc. 3d 1218(A) (Sup. Ct. Tompkins Cty. 2014) *aff'd*, 135 A.D.3d 1121, 23 N.Y.S.3d 444 (3rd Dep't 2016) (citing *446 W. 44th St. v. Riverland Holding Corp.*, 267 A.D. 135, 137, 44 N.Y.S.2d 766 (1st Dep't 1943)) (emphasis added) (the default letter, which demanded only the amounts then due or to become due and which indicated that failure to pay the total amount past due *may* result in acceleration of the sums secured by the mortgage, did not constitute a clear and unequivocal acceleration of the entire mortgage debt).

And it must be "clear and unequivocal."

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Bank of America

July 12, 2011

[redacted]

Account No: [redacted]
Premises: [redacted]

**NOTICE OF INTENT TO ACCELERATE**

Dear [redacted]

Bank of America, N.A. (hereinafter "Bank of America, N.A.") services the home loan described above on behalf of the holder of the promissory note (the "Noteholder"). The loan is in serious default because the required payments have not been made. The total amount now required to reinstate the loan as of the date of this letter is as follows:

| | | |
|---|---|---|
| Monthly Charges: | 06/01/2011 | $3,063.38 |
| Late Charges: | 06/01/2011 | $30.63 |
| Other Charges: | Uncollected Late Charges: | $61.26 |
| | Uncollected Costs: | $0.00 |
| | Partial Payment Balance: | -$0.00 |
| | TOTAL DUE: | $3,155.27 |

You have the right to cure the default. To cure the default, on or before August 16, 2011, Bank of America, N.A. must receive the amount of $3,155.27 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before August 16, 2011.

The default will not be considered cured unless Bank of America, N.A. receives "good funds" in the amount of $3,155.27 on or before August 16, 2011. If any check (or other payment) is returned to us for insufficient funds or for any other reason, "good funds" will not have been received and the default will not have been cured. No extension of time to cure will be granted due to a returned payment. Bank of America, N.A. reserves the right to accept or reject a partial payment of the total amount due without waiving any of its rights herein or otherwise. For example, if less than the full amount that is due is sent to us, we can keep the payment and apply it to the debt but still proceed to foreclosure since the default would not have been cured.

If the default is not cured on or before August 16, 2011, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property. If your property is foreclosed upon, the Noteholder may pursue a deficiency judgment against you to collect the balance of your loan, if permitted by law.

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## What Constitutes Acceleration?

- Notice of *intent* to accelerate is not acceleration if notice of default "was nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's option acceleration clause." *21st Mortg. Corp. v. Adames*, 153 A.D.3d 474, 474, 60 N.Y.S.3d 198 (2d Dep't 2017).

Legal Services NYC DEMAND JUSTICE

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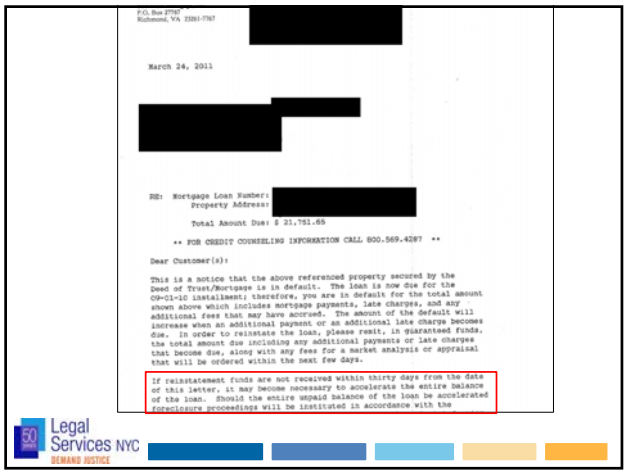

March 24, 2011

RE: Mortgage Loan Number:
Property Address:

Total Amount Due: $ 21,781.65

** FOR CREDIT COUNSELING INFORMATION CALL 800.569.4287 **

Dear Customer(s):

This is a notice that the above referenced property secured by the Deed of Trust/Mortgage is in default. The loan is now due for the 09-01-10 installment; therefore, you are in default for the total amount shown above which includes mortgage payments, late charges, and any additional fees that may have accrued. The amount of the default will increase when an additional payment or an additional late charge becomes due. In order to reinstate the loan, please remit, in guaranteed funds, the total amount due including any additional payments or late charges that become due, along with any fees for a market analysis or appraisal that will be ordered within the next few days.

If reinstatement funds are not received within thirty days from the date of this letter, it may become necessary to accelerate the entire balance of the loan. Should the entire unpaid balance of the loan be accelerated foreclosure proceedings will be instituted in accordance with the

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## What Constitutes Acceleration?

- Commencement of a foreclosure action
  - The foreclosure complaint will generally allege either that plaintiff accelerates and calls the entire debt due by the very commencement of the foreclosure, or identify an earlier acceleration point based on the mortgagee's election.
  - "Here, [Predecessor-in-interest] commenced an action to foreclose the subject mortgage, which was unquestionably notice of the intent to accelerate." *Arbisser v. Gelbelman*, 286 A.D.2d 693, 694, 730 N.Y.S.2d 157 (2d Dep't 2001).
  - But see *Freedom Mortgage Co. v. Engel,* 37 NY3d 1 and related cases for fuller picture of recent law!

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## What Constitutes Acceleration?

- Acceleration by a predecessor-in-interest constitutes valid acceleration as long as the predecessor-in-interest properly accelerated the mortgage and had standing to do so.
  - *EMC Mortg. Corp. v. Smith*, 18 A.D.3d 602, 603, 796 N.Y.S.2d 364 (2d Dep't 2005) ("the statute of limitations began to run when the plaintiff's predecessor-in-interest…elected to accelerate the subject mortgage.").
  - A successful "standing" challenge in a prior foreclosure action can therefore defeat statute of limitations in a later action

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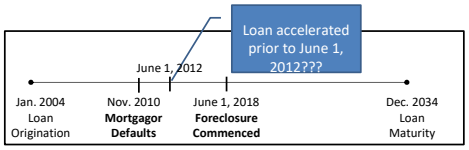
## Illustrating the Effect of Acceleration

- **Homeowner defaults on loan on November 1, 2010**
- **Lender brings foreclosure action on June 1, 2018**
  - If the loan was accelerated prior to June 1, 2012, the action is time-barred and should be dismissed with prejudice; but
  - If the loan is accelerated only upon the commencement of the foreclosure action, the lender is barred *only* from collecting principal & interest payments due before June 1, 2012.

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## Ineffective Accelerations

- Courts have rejected the statute of limitations defense upon a finding that the lender's purported acceleration was ineffective and therefore failed to start the clock running.

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## Ineffective Accelerations

- Mortgage **not accelerated** by prior foreclosure action where that prior case was dismissed for lack of standing.
  - *U.S. Bank Natl. Assn. v. Gordon*, 158 A.D.3d 832, 72 N.Y.S.3d 156 (2d Dep't 2018) ("Here, however, it had already been determined that the prior plaintiff in the 2007 action did not have standing to commence that action because it was not the holder of the note and mortgage at the time that the 2007 action was commenced. Accordingly, service of the 2007 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt, since the prior plaintiff did not have the authority to accelerate the debt or to sue to foreclose at that time."). But see: *Sharova v. Wells Fargo NA as Trustee*, 92 N.Y.S.3d 546 (NY Sup.).
  - *Wells Fargo Bank, N.A. v. Burke*, 94 A.D.3d 980, 943 N.Y.S.2d 540 (2d Dep't 2012) ("[S]ervice of the 2002 complaint was ineffective to constitute a valid exercise of the option to accelerate the debt since the [bank] did not have the authority to accelerate the debt or to sue to foreclose at that time.").
  - *EMC Mortgage Corp. v. Suarez*, 49 A.D.3d 592, 593, 852 N.Y.S.2d 791 (2d Dep't 2008) ("[T]he purported acceleration was a nullity and the six-year statute of limitations, which ordinarily would commence running on the date of acceleration, did not begin to run on the entire debt at that time." (citations omitted))
    - Court also noted that "recovery is limited to only those unpaid installments which accrued within the six-year period immediately preceding its commencement of this action." *Id.*

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## Ineffective Accelerations

Lenders now arguing that their predecessors lacked of standing.

*E.g. Deutsche Bank National Trust Company v. Bernal*, 56 Misc. 3d 915, 59 N.Y.S.3d 267 (Sup. Ct. Westchester Cty. 2017) (Scheinkman, J.), the plaintiff argued that its 2015 action was not time barred because its predecessor-in-interest lacked standing when it commenced a 2009 action which had been dismissed for lack of prosecution. Court entertained this argument but ultimately rejected it because "plaintiff has failed to show that [its predecessor] lacked standing to accelerate the debt by the filing of the 2009 complaint."

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## Lenders now arguing that their predecessors lacked standing (cont.)

- *Residential Mortg. Loan Trust v. Fiorita,* https://www.law.com/newyorklawjournal/almID/1535484410NY600936201/ (Suffolk Cty. August 8, 2018) (Plaintiff's submission of an attorney's affirmation, not based on personal knowledge, alleging that plaintiff in first action lacked standing was insufficient to defeat defendant's showing that the action was time barred, and even if that affirmation were sufficient, its contents were belied by the record in the 2007 action that established that plaintiff therein was the owner and holder of the note and mortgage when that action was commenced).

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## Acceleration, re-acceleration and revocation of debt are redefined after *Engel*

The Engel line of cases changed the landscape for defendants. Prior to *Engel*, courts were split on the question of whether language stating that the loan "will be accelerated" was unequivocal acceleration and there was some question about whether a voluntary discontinuance that was silent on revocation could really serve to de-accelerate the subject loan.

Engel found that voluntary discontinuance DID revoke acceleration, even where there was no explicit language to this effect. (see Pos-Engel slides for more detail).

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## What Is NOT Revocation?

- Dismissal of a foreclosure action by the court
  - *Fed. Nat'l Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88 (2d Dep't 1994).
- Service of a 90 day notice under RPAPL 1304 (NY statutory pre-foreclosure predicate notice)
  - *Deutsche Bank Nat'l Trust Co. v. Adrian*, 157 A.D.3d 934, 935-36, 69 N.Y.S.3d 706 (2d Dep't 2018).

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## Pre-*Engel* Cases Discussing Voluntary Discontinuance - Largely Changed by *Engel*

- *NMNT Realty Corp v. Knoxville 2012 Trust*, 151 A.D.3d 1068, 1070, 58 N.Y.S.3d 118 (2d Dep't 2017). (Finding "triable issue of fact as to whether [plaintiff in prior foreclosure action]'s motion 'constituted an affirmative act by the lender to revoke its election to accelerate.'" )
- *Nationstar v. Cobb*, Index No 504154/2014 (Sup. Ct. Kings Cty. Apr. 24, 2018) (Dear, J.). (Determination as to whether discontinuance is revocation "is properly made on a case-by-case basis seemingly by examining whether the conduct of the plaintiff therein would lead a fact-finder to conclude that the loan was restored to being an installment contract. . . . The subsequent correspondence produced by Plaintiff reflects that it was demanding only the past due portion of the loan (as would be the case if the loan were de-accelerated) rather than the entirety (as would have been the case if there were still an acceleration.)"

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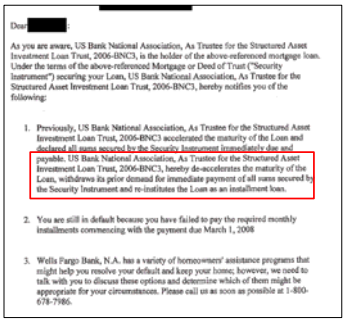
## "De-acceleration" Letters



Dear [redacted]

As you are aware, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, is the holder of the above-referenced mortgage loan. Under the terms of the above-referenced Mortgage or Deed of Trust ("Security Instrument") securing your Loan, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, hereby notifies you of the following:

1. Previously, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3 accelerated the maturity of the Loan and declared all sums secured by the Security Instrument immediately due and payable. US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, 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.
2. You are still in default because you have failed to pay the required monthly installments commencing with the payment due March 1, 2008
3. Wells Fargo Bank, N.A. has a variety of homeowners' assistance programs that might help you resolve your default and keep your home; however, we need to talk with you to discuss these options and determine which of them might be appropriate for your circumstances. Please call us as soon as possible at 1-800-678-7986.

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## "De-Acceleration" Letters

*Soroush v. Citimortgage, Inc.*, 161 A.D.3d 1124, __ N.Y.S. 3d __, 2018 N.Y. Slip Op. 03724 (2d Dep't 2018)

Question of fact as to whether putative revocation letter proffered by lender actually preceded the expiration of limitations period because "nothing on the face of the letter establishes when it was actually mailed, and no independent evidence of the mailing date was submitted."

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## "De-Acceleration" Test

*Citimortgage, Inc. v. Ramirez*, 59 Misc.3d 1212(A), *3, 2018 N.Y. Slip Op. 50525(U) (Sup. Ct. Schenectady Cty. Apr. 5, 2018) (Versaci J.).

5 prong test to determine if lender successfully revokes acceleration:

- 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.

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## Acknowledgement or New Promise to Pay in Writing Can Restart Limitations Period

- NY GOL § 17-101: An acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property.

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## Permanent Modification Will Re-Start Limitations Period

- *Bank of N.Y. v Hutchinson,* 57 Misc 3d 1204(A) (Kings Cty. 2017) (foreclosure action based on default under loan modification agreement not time-barred by virtue of commencement of prior foreclosure action).
- *Karpa Realty Group, LLC v. Deutsche Bank Natl. Trust Co.,* 2018 NY Slip Op 05921 (2d Dep't August 29, 2018) (letter accompanying application for short sale was not unqualified acknowledgement of the debt or promise to repay for purposes of resetting statute of limitations pursuant to N.Y. G.O.L. § 101.

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## Trial Plan Payments May "Acknowledge" Debt and Restart Clock in wake of *Jeanty*

- Prior cases tended to find that modification applications and trial plan payments did NOT revoke acceleration. *Costa v. Deutsche Bank Nat'l Trust Co*., 2017 WL 1194698 (S.D.N.Y 2017) (HAMP applications and hardship letters not unconditional acknowledgment and promise to pay).*U.S. Bank Nat. Assoc. v. Martinez*, 2016 WL 7973961 (Kings Cty. Sup. Ct. 2016) (borrower's payments on HAMP TPP not an acknowledgement of the debt sufficient to toll and renew the statute of limitations).
- However, in *Fed. Nat'l Mortgage Ass. v Jeanty*, 39 NY3d 951, the NY Court of Appeals found that trial payments could be an acknowledgement of the debt and thus restart the statute of limitations.

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## Resetting the Limitations Period: NY GOL § 17-105 (1)

"A waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise. If the waiver or promise specifies a shorter period of limitation than that otherwise applicable, the time limited shall be the period specified."

N.Y. General Obligations Law § 17-105 (1).

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## Resetting the Limitations Period: NY GOL § 17-105 (1)

- In other words, a borrower can contractually agree to reset the statute of limitations period or adjust the remaining limitations period.
- To be valid, the waiver/ adjustment must be:
  (1) Express;
  (2) In writing; and
  (3) Signed by the party waiving the defense/ adjusting the limitations period.
- If the waiver is valid, the statute of limitations will reset from the date of the waiver or promise, unless otherwise specified.
- A promise to pay the mortgage debt, if express, in writing and signed by the mortgagor, will also reset the statute of limitations period, subject to any conditions expressed in the writing.

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## Resetting the Limitations Period: NY GOL § 17-105 (1) - Some Pre-Jeanty Cases that May Be Useful

- In order for a promise to pay to restart the limitations period, it must be an "express promise to pay the mortgage debt *per se*," or an "express acknowledgment of the indebtedness."
  *Petito v. Piffath*, 85 N.Y.2d 1, 8, 647 N.E.3d 732 (1994).
- In order for a payment to restart the limitations period, it must be "accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder."
  *Saini v. Cinelli Enters. Inc.*, 289 A.D.2d 770, 772, 733 N.Y.S.2d 824, 827 (3rd Dep't 2001).
  - "[B]ecause the plaintiff asserts that the payment was made as a condition to receiving an extension of a bankruptcy stay, the payment did not constitute an unqualified acknowledgement of the debt or manifest a promise to pay the remainder."
    *U.S. Bank Nat. Ass'n v. Martin*, 144 A.D.3d 891, 893, 41 N.Y.S.3d 500 (2d Dep't 2016).

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## Resetting the Limitations Period: NY GOL § 17-105 (1) - Effect of Bankruptcy

- Payments made through a bankruptcy plan might re-set the statute of limitations.
  - *Albin v. Dallacqua*, 254 A.D.2d 444, 445, 679 N.Y.S.2d 402, 402, 1998 N.Y. Slip Op. 09319 (2d Dep't 1998).
    Borrower's bankruptcy plan satisfied the criteria of General Obligations Law § 17-105 (1) to extend the Statute of Limitations where the borrower's "promise in the bankruptcy plan to pay the mortgage at issue was made after the accrual of a right of action to foreclose on the mortgage, was express, and was in a writing signed by the plaintiff."
  - *The Bank of New York Mellon v. Wiggins*, 2015 WL 9273426, at *2, 2015 NY Slip Op 32359(U), at *5 (Sup. Ct. N.Y. Cty. 2015) (J. Weiss).
    "Contrary to the defendant's claim, this action is timely inasmuch as the defendant's Bankruptcy filing in which she acknowledged the mortgage debt and negotiated a mitigation plan and made payments on the mortgage pursuant to the bankruptcy plan was sufficient to extend the statute of limitations (see General Obligations Law § 17-105 (1); *Nat'l Loan Inv'rs, L.P. v. Piscitello*, 21 A.D.3d 537, 538 (2d Dep't 2005); *Albin v. Dallacqua*, 254 A.D.2d 444 (2d Dep't 1998))."

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**Resetting the Limitations Period: NY GOL § 17-105 (1) - Effect of Bankruptcy Cont'd**

- Not effective if the lender rejects the promise to pay.

*See Albin v. Pearson*, 266 A.D.2d 487, 698 N.Y.S.2d 732 (2d Dep't 1999) (affirming judgment cancelling and discharging mortgages and finding that the mortgagor's bankruptcy plan, which provided that the mortgagor make payments on the mortgages, did not constitute a promise to pay the mortgage debt within the meaning of NY General Obligations Law § 17-105 (1) and thus did not extend the statute of limitations because the mortgagee rejected the plan).

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**Tolling the Statute of Limitations - Effect of Bankruptcy**

- Bankruptcy may toll the statute of limitations when the automatic stay actually prevents a lender from commencing an action.
  - "Plaintiff does not benefit of any tolling of the statute of limitation period under CPLR § 204 (a) because Defendant's Chapter 13 Bankruptcy filing did not stay Plaintiff's ability to commence an action. Indeed, Plaintiff had already commenced the action on October 4, 2007, whereas Defendant filed for Bankruptcy protection in April, 2009." *Beneficial Homeowner Service Corp. v. Tovar*, Index No. 61092/2014 at *3, 2014 WL 8770905, (Sup. Ct. Suffolk Cty. Dec. 22, 2014), *aff'd*, 150 A.D.3d 657, 55 N.Y.S.3d 59 (2d Dep't 2017) .
  - *But see Lubonty v. U.S. Bank, N.A.*, 159 A.D.3d 962 , 964, 74 N.Y.S.3d 279 (2d Dep't 2018). "Pursuant to CPLR 204(a), the Bankruptcy Code's automatic stay tolls the limitations period for foreclosure actions." Court also held that "[t]he [borrower]'s contention that CPLR 204(a) does not apply here because the earlier foreclosure actions had already been commenced when the petitions in bankruptcy were filed is without merit."

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**Tolling the Statute of Limitations**

"Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced."

N.Y. C.P.L.R. § 204(a)

- *See In re Strawbridge*, No. 11 Civ. 6759 PAE, 2012 WL 701031, at *9-10 (S.D.N.Y. Mar. 6, 2012) (even though approximately 11 years had passed since the lender accelerated the mortgage, the statute of limitations had been tolled for all but 2 of those years because of numerous bankruptcy and state court stays).

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### Tolling the Statute of Limitations - Effect of Bankruptcy

- Effect of the automatic stay in bankruptcy on tolling:
  - *Saini v. Cinelli Enterprises Inc.*, 289 A.D.2d 770, 772, 733 N.Y.S.2d 824 (3d Dep't 2001) (bankruptcy filing did not renew nor toll statute of limitations because the first action had been discontinued prior to the bankruptcy and the bankruptcy petition was dismissed long before the second foreclosure action was commenced).
  - *Mercury Capital Corp. v. Shepherds Beach, Inc.*, 281 A.D.2d 604, 605, 733 N.Y.S.2d 48 (2d Dep't 2001) (the bankruptcy stay only tolled the statute of limitations from the filing of the bankruptcy petition to the confirmation of the chapter 11 plan, a period of 1 year and 4 months and the plaintiff waited 7 years and 7 months to commence the foreclosure action).

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### NY GOL § 17-105 (1) and Chapter 13

If a lender accelerates a mortgage debt, the consequent running of the time period may be tolled if the homeowner subsequently files for bankruptcy protection, and therein acknowledges the debt and promises to pay within a set time pursuant to a Chapter 13 plan. *See Nat'l Loan Investors, L.P. v. Piscitello*, 21 A.D.3d 537, 801 N.Y.S.2d 331 (2d Dep't 2005).

- Unless the lender rejects the plan! (*Albin v. Pearson*)

- *See also PSP-NC, LLC v. Raudkivi*, 138 A.D.3d 709, 29 N.Y.S.3d 51 (2d Dep't 2016) (borrower acknowledged the mortgage debt in his Chapter 13 bankruptcy plan and promised to repay it, which renewed the limitations period and the automatic bankruptcy stay tolled the renewed limitations period).

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### Tolling the Statute of Limitations

- Tolling pursuant to CPLR § 204(a) is narrowly construed.
  - *U.S. Bank N.A. v. Joseph*, 159 A.D.3d 968, 73 N.Y.S.3d 238 (2d Dep't 2018) (A temporary restraining order in prior foreclosure action "prevented the plaintiff from selling the property at auction, but only in the context of the first foreclosure action. The temporary restraining order did not prevent the plaintiff from discontinuing the first foreclosure action and commencing a new action. Thus, the plaintiff was not entitled under CPLR 204(a) to have the time during which the temporary restraining order was in effect excluded from the statute of limitations.")

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## Tolling the Statute of Limitations

- CPLR § 210(b) tolls the statute of limitations for eighteen months after the death of a potential defendant for the plaintiff to sue the administrator or executor of the estate.
- "The statute plainly is limited in scope to the executor or administrator of the decedent's estate and does not extend to other defendants in the same action. Consequently, CPLR 210(b) could not extend the statute of limitations period as to [surviving spouse] individually." *U.S. Bank N.A. v. Kess*, 159 A.D.3d 767, 768, 71 N.Y.S.3d 635 (2d Dep't 2018).

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## Tolling the Statute of Limitations

- In *Costa v. Deutsche Bank Natl. Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1*, the Court declined to adopt a number of novel tolling arguments, including:
  - Court rejected argument that statute of limitations was tolled by operation of RPAPL 1301, which merely provides for election of remedies but did not prohibit bringing a foreclosure action;
  - ***Court rejected argument that CPLR 3408 settlement conferences or submission of HAMP applications tolled statute of limitations, finding no support for such argument***; and
  - ***Court rejected argument that RESPA Regulation X provisions tolled statute of limitations (Regulation X loss mitigation provisions were not yet effective and, in any event, no authority supported proposition that it was a statutory prohibition pursuant to CPLR 204(a) that would toll running of statute of limitations).***

*Costa v. Deutsche Bank Natl. Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1*, 247 F. Supp. 3d 329, 345–46 (S.D.N.Y. 2017), *appeal withdrawn sub nom. Costa v. Deutsche Bank Natl. Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1, Mortg. Pass-Through Certificates, Series 2006-OA1*, 17-928, 2017 WL 4574795 (2d Cir. July 12, 2017).

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## Does Mailing a 90-Day Notice Toll the Statute of Limitations?

Lenders may argue that there is a split between the Appellate Departments as to whether service of a 90 day notice under RPAPL § 1304 (NY pre-foreclosure notice requirement) tolls the limitations period.

Spoiler alert: they're wrong.

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## Does Mailing a 90-Day Notice Toll the Statute of Limitations? (No)

- *HSBC Bank USA v Kirschenbaum*, 159 A.D.3d 506, 506–07, 73 N.Y.S.3d 41 (1st Dep't 2018).

"***We reject plaintiff's argument that the 90–day notice under [RPAPL] § 1304 tolled the statute of limitations for 90 days***. CPLR 204(a) authorizes tolling of a statute of limitations and provides that '[w]here the commencement of an action has been stayed by a court or by a statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.' Proper service of the RPAPL 1304 notice is a condition precedent to the commencement of a foreclosure action. ***A statutory prohibition and a condition precedent are separate concepts, and a plaintiff has complete control over the acts necessary to effectuate compliance with a condition precedent***. Here, plaintiff had complete control over when to serve the RPAPL 1304 notice, and could have done so at least 90 days prior to the expiration of the statute of limitations. Plaintiff did not serve the notice until May 26, 2015, less than 90 days before the expiration of the statute of limitations. In addition, there is nothing in RPAPL 1302 or 1304 that proscribes the prosecution of the action." (internal citations omitted).

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## Does Mailing a 90-Day Notice Toll the Statute of Limitations? (No)

- *Deutsche Bank Natl. Tr. Co. v. Adrian*, 157 A.D.3d 934, 935-36, 69 N.Y.S.3d 706, 708 (2d Dep't 2018).

"[T]he plaintiff failed to raise a triable issue of fact as to whether it affirmatively revoked its election to accelerate the mortgage debt within the six-year limitations period (see *JBR Constr. Corp. v. Staples*, 71 A.D.3d 952, 953, 897 N.Y.S.2d 223 (2d Dep't 2010)). The plaintiff voluntarily discontinued the prior foreclosure action on April 23, 2014, after the statute of limitations had expired, and it failed to demonstrate that its April 8, 2014, 90–day notice, as a matter of law, 'destroy[ed] the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt' (*Beneficial Homeowner Serv. Corp. v Tovar*, 150 A.D.3d 657, 658, 55 N.Y.S.3d 59 (2d Dep't 2017))."

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## Does Mailing a 90-Day Notice Toll the Statute of Limitations? (No)

- *Wilmington Sav. Fund Soc'y, F.S.B. v. Gustafson*, 160 A.D.3d 1409, 1410 (4th Dep't 2018).
  - Altering the text of *EMC Mtge. Corp. v. Suarez* to add bracket section "Although this mortgage foreclosure action therefore is not time-barred, we note that 'in the event that the plaintiff prevails in this action, its recovery is limited to only those unpaid installments which accrued within the six-year [**and 90-day**] period immediately preceding its commencement of this action' (*EMC Mtge. Corp.*, 49 A.D.3d at 593; *see* RPAPL 1304; CPLR 204(a)."
  - BUT, the *Gustafson* Court held that the action was not time-barred because the prior actions were commenced by an entity that lacked standing, so there had been no acceleration. The court was not asked whether the SOL had been tolled, by service of a 90-day notice or otherwise.

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## Pre-Foreclosure Notices: The FDCPA Angle: Go on the Offensive!

- 90-Day Notice as Threat to Sue on Time-Barred Debt: *Cortes-Goolcharran v. Rosicki, Rosicki & Associates et al.,* 2018 WL 3748154 (E.D.N.Y. Aug. 7, 2018) (motion to dismiss denied: foreclosure=debt collection subject to FDCPA and plaintiff sufficiently alleged mortgage was accelerated, accelaration not revoked, and that foreclosure action would be time barred (misrepresenting character or legal status of debt--15 USC § 1692 e).

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## Tolling Between Dismissal of First Action and Filing of Second Action

- CPLR § 205(a) allows for the commencement of a second action that would otherwise be time-barred, within six months after the dismissal of a prior, timely commenced action.
- The safe harbor is ***not*** available where the first action was terminated
  - By voluntary discontinuance
  - Because of failure to obtain personal jurisdiction over the defendant
  - Upon neglect to prosecute the action
  - By dismissal on the merits

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## CPLR § 205

- The new action must be filed, AND service must be complete within six-months after the prior action is dismissed. *Pyne v. 20 E. 35 Owners Corp*., 267 A.D.2d 168, 169 (2d Dep't 1999).
- Generally under CPLR 205, the plaintiff must be the same plaintiff as before, but there is an exception "where the successor in interest as the holder of the note and mortgage seeks to recommence a foreclosure action originally commenced by a prior holder of the same note and mortgage, which transferred the note and mortgage to the successor in interest *before* the prior action was dismissed." *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 194, 201-02 (2d Dep't 2017) (emphasis in original).
- "A dismissal premised on lack of standing is not a dismissal on the merits for res judicata purposes." *Caliguri v. JPMorgan Chase Bank, N.A.* 121 A.D.3d 1030, 1031 (2d Dep't 2014).

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## CPLR § 205 and Dismissals for Neglecting to Prosecute

- Dismissals can be broader than just failure to prosecute under CPLR 3216.
- A plaintiff may be able to invoke CPLR § 205(a)'s tolling provision, *even if the first case was dismissed for neglect to prosecute*.
  - "Where a dismissal is one for neglect to prosecute the action made pursuant to [CPLR 3216] or otherwise, the judge shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation." CPLR 205(a).
  - *See also Bank of New York Mellon v. Slavin*, 156 A.D.3d 1073, 1074, 67 N.Y.S.3d 328, 331 (3d Dep't 2017)("Here, the neglect to prosecute exception is inapplicable because the first action was specifically dismissed due to the failure of plaintiff to appear at a mandatory conference . . . and the sua sponte dismissal did not set forth any specific conduct that demonstrated a general pattern of delay.")(citations omitted).
  - *Wells Fargo Bank, N.A. v. Eitani*, 148 A.D.3d 193, 198-99, 47 N.Y.S.3d 80, 84 (2d Dep't 2017), *appeal dismissed*, 77 N.E.3d 892 (2017) ("The order did not include any findings of specific conduct demonstrating 'a general pattern of delay in proceeding with the litigation' . . . . Thus, the Supreme Court correctly determined that the order of dismissal was not based on a neglect to prosecute.") (citations omitted).

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## CPLR § 205 and Dismissals for Failure to Send 90-Day Notices

- A dismissal for failure to comply with RPAPL § 1304 is likely not a dismissal "on the merits," so a lender would likely be able to start a new action under CPLR 205. Two cases which don't involve foreclosure are instructive.
  - "Although the [plaintiff] commenced this action within the applicable statute of limitations, it did not meet [a] condition precedent. . . . Under these circumstances, the [plaintiff's] timely claims were properly dismissed without prejudice to refiling pursuant to CPLR 205(a)." *U.S. Bank Nat'l Ass'n v DLJ Mortg. Capital, Inc.*, 141 A.D.3d 431, 432 (1st Dep't 2016), *lv to appeal granted,* 29 N.Y.3d 910, 57 N.Y.S.3d 715 (Table) (2017).
  - Where first action was dismissed for plaintiff's failure to serve a statutorily required notice, the second action which would otherwise have been time-barred, was permitted under CPLR 205(a). "A dismissal for failure to pleading compliance with the condition precedent of Public Authorities Law § 1276(1) is not a dismissal based on a jurisdictional defect such as would preclude application of the provisions of CPLR 205(a)." *Fleming v. Long Island R.R.*, 72 N.Y.2d 998, 1000, 530 N.E.2d 1291 (1988).

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## Effect of Fraudulent Conduct on Tolling

A defendant "may be estopped from pleading the Statute of Limitations as a defense where a defendant's affirmative wrongdoing produced the long delay in bringing suit" but not where the defendant's "'fraudulent' conduct was not aimed at the plaintiff and did not in any way prevent the plaintiff from commencing a timely action."

*Petito v. Piffath*, 85 N.Y.2d 1, 6-7, 647 N.E.2d 732 (1994) (internal quotations and citations omitted).

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## Quieting Title Under RPAPL § 1501(4)

- A mortgagor can bring a claim to cancel and discharge a mortgage upon the expiration of the statute of limitations period:

"Where the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired, any person having an estate or interest in the real property subject to such encumbrance may maintain an action . . . to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom . . . In any action brought under this section it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not, been paid."

NY RPAPL § 1501(4).

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## Quieting Title Under RPAPL § 1501(4)

- A *prima facie* showing of entitlement to judgment as a matter of law under RPAPL § 1501(4) requires a demonstration that the six-year time limit on enforcing a mortgage has expired.
- Where the mortgagor makes this showing, and the mortgagee fails to raise a triable issue of fact as to the expiration of the limitations period, the mortgagor is entitled to cancelation and discharge of the subject mortgage.

*Rack v. Rushefsky*, 5 A.D.3d 753, 753–54, 773 N.Y.S.2d 569 (2d Dep't 2004).

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## Quieting Title Under RPAPL § 1501(4)

- Can be asserted in a stand-alone quiet-title action seeking declaratory and injunctive relief.

*MSMJ Realty, LLC v. DLJ Mortg. Capital Inc.*, 157 A.D.3d 885, 69 N.Y.S.3d 870 (2d Dep't 2018); *Kashipour v. Wilmington Savs. Fund Soc., FSB*, 144 A.D.3d 985, 41 N.Y.S.3d 738 (2d Dep't 2016); *JBR Const. Corp. v. Staples*, 71 A.D.3d 952, 897 N.Y.S.2d 223 (2d Dep't 2010).

- Or as a counterclaim in an untimely foreclosure action (which would also allow you to seek attorneys' fees under RPL § 282).

*Citimortgage, Inc. v. Ramirez,* 59 Misc.3d 1212(A) (Sup. Ct. Schenectady Ct. Apr. 5, 2018) (Versaci, J.); *U.S. Bank N.A. v. Rowe*, 2017 N.Y. Slip Op. 32819(U) (Sup. Ct. Queens Cty. Jan. 3, 2018) (Pineda-Kirwan, J.).

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## Quieting Title Under RPAPL § 1501(4)

- Statute requires that "***no such action shall be maintainable in any case where the mortgagee, holder of the vendor's lien, or the successor of either of them shall be in possession of the affected real property at the time of the commencement of the action***."
  - Practice tip: Be sure to affirmatively plead that the homeowner is in possession of the subject property, and that the mortgagee is not.
  - *CIT Bank, N.A. v. Cameron*, Index Number 703308/2017 (Sup. Ct. Queens Cty. Apr. 11, 2018) (Pineda-Kirwan, J.) (Defendant "has not established entitlement to an order directing the cancellation and discharge of the mortgage as he has not submitted proof that he, and not plaintiff, is in possession of the subject property.").

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## Lenders Arguments About Unjust Enrichment

- "We paid their property taxes and insurance"
- "Boo Hoo"
- *Wells Fargo Bank, N.A. v Burke,* 155 AD3d 668 (2d Dep't 2017) (unjust enrichment claim asserted by time-barred lender based on payment of taxes and insurance (a) was time barred to extent asserted more than six years after payments made; and (b) failed to state a cause of action under payment doctrine: lender paid to preserve its own priority position, not for borrower's benefit) *See also Costa v. Deutsche Bank National Trust Co.,* 2017 WL 1194698 (SDNY 2017)

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## How to Screen for Statute of Limitations Issues

Some Questions to Ask:

1) When did the borrower default? Was it more than six years ago?
2) If so, did the bank send an acceleration letter? Did the letter clearly and unequivocally accelerate the loan? Was the acceleration letter sent more than 6 years prior to the commencement of the foreclosure action?
3) Did the bank commence a prior foreclosure action more than 6 years before commencing a new case (if a new case is pending)?
   i. If so, was the case dismissed for lack of standing? If yes, then your statute of limitation defense is weak, especially in the Second Department.
4) Has the bank affirmatively and unambiguously revoked acceleration?
5) Did the borrower file for bankruptcy or would a stay have prevented the bank from timely commencing a foreclosure action?
6) Has the bank commenced a new foreclosure action?
7) Has the borrower filed an answer asserting a statute of limitations defense?

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## Practice Tip #1: Assert SOL Defense in a Timely Answer

**A STATUTE OF LIMITATIONS DEFENSE MAY BE WAIVED IF NOT TIMELY ASSERTED (CPLR 3211(a)(5).**

- *21st Mtge. Corp. v. Palazzotto*, 2018 NY Slip Op 06072, __ A.D. 3d __(Sept. 19, 2018) (statute of limitations defense waived by failure to timely assert in pre-answer motion to dismiss or answer); *MidFirst Bank v. Ajala*, 146 A.D.3d 875, 44 N.Y.S.3d 771, 772 (2d Dep't 2017), *leave to appeal dismissed*, 81 N.E.3d 1219 (2017), *reargument denied*, 91 N.E.3d 1180 (2017); *South Point, Inc. v. Rana*, 139 A.D.3d 935, 935-936 (2d Dep't 2016); *Ferri v. Ferri*, 71 AD3d 949, 950 (2d Dep't 2010)). *See also Eke v. City of New York*, 116 A.D.3d 403, 984 N.Y.S.2d 6 (1st Dep't 2014).

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## Practice Tip #2: Assert a Counterclaim Under R.P.A.P.L. § 1501(4)

This is necessary to assert to have the mortgage lien canceled and discharged.

*See Deutsche Bank Natl. Tr. Co. v. Gambino*, 153 A.D.3d 1232, 1234-35, 61 N.Y.S.3d 299, 301 (2d Dep't 2017)("[T]hat branch of [borrower's] motion which was to cancel and discharge the mortgage pursuant to RPAPL 1501 (4) was properly denied, since that relief must be sought in an action and not by motion."

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## Practice Tip #3: Include a Claim for Attorneys' Fees Under N.Y. R.P.L. § 282(1)

- N.Y. R.P.L. § 282(1) provides that a mortgagor who successfully defends against "any action or proceeding commenced by the mortgagee against the mortgagor arising out of the contract" is entitled to seek reasonable attorneys' fees and costs from the mortgagee, provided that the mortgage expressly allows the mortgagee to collect reasonable attorney's fees and costs for enforcing the mortgage.
- But *Tovar* court said not earned under § 282 – not clear why.

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## Practice Tip # 4:
## Statutes of Limitations and FHA Loans

- 28 U.S.C. § 2415(a) establishes a six-year limitations period for the federal government to sue for breach of contract. However, 28 U.S.C. § 2415(c) provides that there is no statute of limitations for the federal government to "bring[ ] an action to establish the title to, or right of possession of, real or personal property."
- Taken together, this suggests that the federal government is not limited to bring an action in foreclosure, but may not seek a deficiency judgment (or, presumably, bring an action on the note) beyond six years after the cause of action accrues. *Westnau Land Corp. v. U.S. Small Bus. Admin*, 1 F.3d 112 (2d Cir. 1993).
- *RCR Servs. v. Herbil Holding Company*, 229 A.D.2d 379, 380 (2d Dep't 1996) (foreclosure claim not time-barred where "the plaintiff, although not the Federal Government, has submitted evidence sufficient to determine as a matter of law that it is prosecuting this claim as an assignee/agent of the Secretary of Housing and Urban Development (hereinafter HUD) and that the ultimate benefits of the foreclosure will flow to HUD.")

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## Practice Tip # 5:
## Prior Actions Dismissed for Lack of Service

- Some lenders claim that if a defendant wasn't served in a prior action, the loan wasn't accelerated. They're wrong.
  - "[T]he unequivocal overt act of the plaintiff in filing the summons and verified complaint and *lis pendens* constituted a valid election. It disclosed the choice of the plaintiff and constituted notice to all third parties of such choice. To elect is to choose. The fact of election should not be confused with the notice or manifestation of such election." *Albertina Realty Co. v. Rosbro Realty Corp.*, 258 N.Y. 472, 476 (1932) (emphasis added).
  - "[T]he fact that the 2007 action was dismissed as against the defendant homeowner for failure to effectuate personal service does not invalidate the plaintiff's election to exercise its right to accelerate the maturity of the debt. . . . Consequently, the failure to properly serve the summons and complaint upon the homeowner did not as a matter of law destroy the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt." *Beneficial Homeowner Service Corp. v. Tovar*, 150 A.D.3d 657 (2d Dep't 2017).
  - See also: *Clayton National, Inc. v. Guldi*, 307 A.D.2d 982, 982 (2d Dep't 2003); *Citibank, N.A. v. McGlone*, 270 A.D.2d 124, 125, 704 N.Y.S.2d 576, 577-78 (1st Dep't 2000); *City Streets Realty Corp. v. Jan Jay Constr. Enters. Corp.*, 88 A.D.2d 558, 559 (1st Dep't 1982); *Fannie Mae v. 133 Mgmt. LLC*, 126 A.D.3d 670, 670 (2d Dep't 2015).

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## Practice Tip # 6:
## Evidence Refuting Claims of Revocation

- If a lender claims to have revoked its prior acceleration, is there evidence that is inconsistent with this claim?
  - Did the lender renew a notice of pendency after "revocation"?
  - Did the lender send statements or bills seeking the full amount, rather than installment payments?
  - Did the lender send correspondence saying that the loan was in foreclosure?
  - Did the lender report to credit reporting agencies that loan is in foreclosure?
  - Did the borrower receive actual notice? What establishes receipt?
- Where can you get this evidence?
  - Discovery demands: all correspondence from servicer, transaction history, payment history (for some servicers, these are two different things)
  - Your client's records
  - Qualified Written Requests/Requests for Information
  - Court records
  - Credit Reports
  - Depositions of lender's employee

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# Statute of Limitations Defenses and Affirmative Claims in New York Residential Mortgage Cases

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QUEENS LEGAL SERVICES
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HOPP TRAINING, JANUARY 13, 2023

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## Statute of Limitations, Uses

- Statute of Limitations defenses can be used to defeat a foreclosure action
- Statute of Limitations can be used offensively to discharge the mortgage and clear or quiet title

2

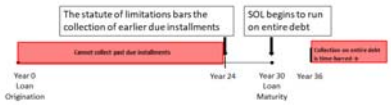
## General Principles

- CPLR 213(4) provides that the limitations period to foreclose on a note secured by real property is six years.
- The six-year period begins to run:
  - From the date of each unpaid installment, or
  - From the time the mortgagee is entitled to demand full payment, or
  - From the date the mortgage is accelerated.

3

## Maturity

The statutes of limitations begins to run on the entire debt upon the loan's maturity. *Quackenbush v. Mapes*, 123 A.D. 242 (1st Dep't 1908).

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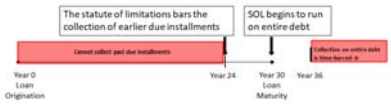


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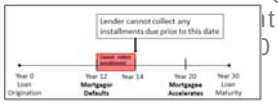


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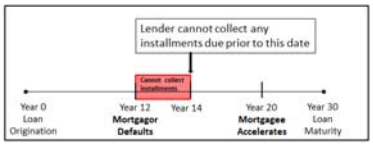


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8

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9

## SOL on Reverse Mortgages

- The statute of limitations for reverse mortgages begins to run when the triggering event occurs (i.e. death or permanent departure of the borrower), not when the lender decides to make the demand for repayment. *Wendover Fin. Servs. v. Ridgeway*, 137 A.D.3d 1718, 1719, 28 N.Y.S.3d 535 (4th Dep't 2016).
- there is at least one case that found an exception to SOL for the assignee of a HUD loan. *RCR Servs. Inc. v. Herbil Holding* Co., 229 A.D.2d 379, 380, 645 N.Y.S.2d 76, 77 (2d Dep't 1996)

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## What Constitutes Acceleration? Notice to borrower …

An election to accelerate the mortgage must consist of a **notice** of election to the mortgagor **or** some **overt act** manifesting such an election.

The notice must be clear and unequivocal, including

- filing of a foreclosure action
- pre-foreclosure notice to borrower demanding payment in full

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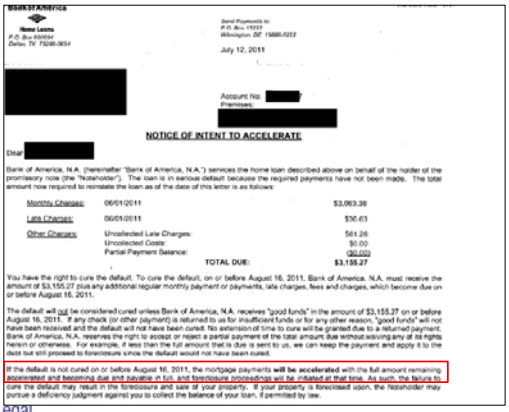

Bank of America
Home Loans
P.O. Box 660954
Dallas, TX 75266-0954

Send Payments to:
P.O. Box 15222
Wilmington, DE 19886-5222

July 12, 2011

[redacted]

Account No: [redacted]
Premises: [redacted]

**NOTICE OF INTENT TO ACCELERATE**

Dear [redacted]

Bank of America, N.A. (hereinafter "Bank of America, N.A.") services the home loan described above on behalf of the holder of the promissory note (the "Noteholder"). The loan is in serious default because the required payments have not been made. The total amount now required to reinstate the loan as of the date of this letter is as follows:

| | | |
|---|---|---|
| Monthly Charges: | 06/01/2011 | $3,063.38 |
| Late Charges: | 06/01/2011 | $30.63 |
| Other Charges: | Uncollected Late Charges: | $61.26 |
| | Uncollected Costs: | $0.00 |
| | Partial Payment Balance: | ($0.00) |
| | TOTAL DUE: | $3,155.27 |

You have the right to cure the default. To cure the default, on or before August 16, 2011, Bank of America, N.A. must receive the amount of $3,155.27 plus any additional regular monthly payment or payments, late charges, fees and charges, which become due on or before August 16, 2011.

The default will not be considered cured unless Bank of America, N.A. receives "good funds" in the amount of $3,155.27 on or before August 16, 2011. If any check (or other payment) is returned to us for insufficient funds or for any other reason, "good funds" will not have been received and the default will not have been cured. No extension of time to cure will be granted due to a returned payment. Bank of America, N.A. reserves the right to accept or reject a partial payment of the total amount due without waiving any of its rights herein or otherwise. For example, if less than the full amount that is due is sent to us, we can keep the payment and apply it to the debt but still proceed to foreclosure since the default would not have been cured.

If the default is not cured on or before August 16, 2011, the mortgage payments **will be accelerated** with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property. If your property is foreclosed upon, the Noteholder may pursue a deficiency judgment against you to collect the balance of your loan, if permitted by law.

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## Standing Matters!

Acceleration by a predecessor-in-interest constitutes valid acceleration as long as the predecessor-in-interest properly accelerated the mortgage **and had standing to do so.**

NOTE: A successful challenge to standing in a prior foreclosure case can defeat a statute of limitations defense in a later action

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## De-acceleration / Revocation of Acceleration

A lender may de-accelerate or revoke acceleration

Must be within 6-year statute of limitations

Revocation of acceleration may be rejected by a court if the borrower has changed their position based on the acceleration

14

## "De-Acceleration" Test (pre-Engel)

5 prong test to determine if lender successfully revokes acceleration:

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.

*Citimortgage, Inc. v. Ramirez*, 59 Misc.3d 1212(A), *3, 2018 N.Y. Slip Op. 50525(U) (Sup. Ct. Schenectady Cty. Apr. 5, 2018) (Versaci J.).

15

## Effect of Discontinuance Pre-*Engel*

- Trial courts were briefly split as to whether a voluntary discontinuance served to revoke acceleration.
- However, the various departments of the Appellate Division addressing the issue consistently held that a discontinuance that was silent about revocation failed to revoke acceleration of the subject loan.

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## The 4 *Engel* Cases

- *Vargas v. Deutsche Bank National Trust Co (1st Dep't)*
  - Did default notice accelerate loan?
- *Wells Fargo Bank v. Ferrato* (1st Dep't)
  - Did 2 prior foreclosure actions accelerate loan?
- *Freedom Mortgage Corporation v. Engel* and *Ditech Financial, LLC v. Naidu* (both 2d Dep't)
  - Did discontinuances of prior actions revoke acceleration?

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## *Engel* and *Naidu*

"A voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. Accordingly, we conclude that where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder." (P. 19.)

18

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## *Engel* and *Naidu* – Acceleration By Complaint

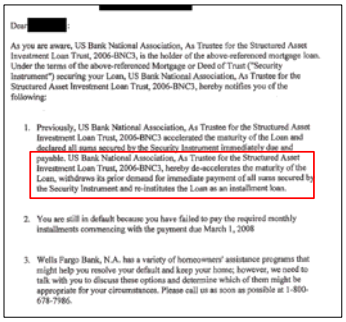
Look for other acts of acceleration. **Discontinuance only serves to revoke acceleration that was effected by filing the complaint**.

- What else could have accelerated the loan?
  - Acceleration notice
  - Mortgage Statements

19

19

## "De-acceleration" Letters



Dear [redacted]:

As you are aware, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, is the holder of the above-referenced mortgage loan. Under the terms of the above-referenced Mortgage or Deed of Trust ("Security Instrument") securing your Loan, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, hereby notifies you of the following:

1. Previously, US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3 accelerated the maturity of the Loan and declared all sums secured by the Security Instrument immediately due and payable. US Bank National Association, As Trustee for the Structured Asset Investment Loan Trust, 2006-BNC3, 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.

2. You are still in default because you have failed to pay the required monthly installments commencing with the payment due March 1, 2008

3. Wells Fargo Bank, N.A. has a variety of homeowners' assistance programs that might help you resolve your default and keep your home; however, we need to talk with you to discuss these options and determine which of them might be appropriate for your circumstances. Please call us as soon as possible at 1-800-678-7986.

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## ***Engel:*** No impact on cases where discontinuance was more than six years after acceleration

- *E.g.*, *Federal Natl. Mtge. Assn. v Sajdak*, 2021 NY Slip Op 01393 (2d Dep't March 10, 2021) (action time-barred because defendant established prior foreclosure action was not discontinued until *after* expiration of six-year statute of limitations)

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21

## Acknowledgement or New Promise to Pay in Writing Can Restart Limitations Period

- NY GOL § 17-101: an acknowledgement or promise to pay
- NY GOL § 17-105 (1): a waiver or adjustment; must be express and in writing
- Payments in a bankruptcy plan may restart clock, if accepted by mortgage holder
- Permanent Modification

- Jeanty!

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## Tolling the Statute of Limitations

Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." N.Y. C.P.L.R. § 204(a)

Bankruptcy stays may toll the statute of limitations if the automatic stay actually prevents a lender from commencing an action

Death of the borrower stays the statute of limitations for 18 months for mortgage holder to sue the administrator or executor

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## READ CLE CODE NOW!

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## Tolling Between Dismissal of First Action and Filing of Second Action

- CPLR § 205(a) allows for the commencement of a second action that would otherwise be time-barred, within six months after the dismissal of a prior, timely commenced action.
- The safe harbor is ***not*** available where the first action was terminated
  - By voluntary discontinuance
  - Because of failure to obtain personal jurisdiction over the defendant
  - Upon neglect to prosecute the action
  - By dismissal on the merits

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**Look for an upcoming training on CPLR § 205(a) in the wake of a new bill recently signed by Governor Hochul !**

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## Quieting Title Under RPAPL § 1501(4)

- Can be asserted in a stand-alone quiet-title action seeking declaratory and injunctive relief.
- Or as a counterclaim in an untimely foreclosure action (which would also allow you to seek attorneys' fees under RPL § 282).
- A *prima facie* showing of entitlement to judgment as a matter of law under RPAPL § 1501(4) requires a demonstration that the six-year time limit on enforcing a mortgage has expired.
- Borrower must be in possession of the property!
- Quiet title action available even where debt has not been paid.

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## Notes for Practice

- **A STATUTE OF LIMITATIONS DEFENSE MAY BE WAIVED IF NOT TIMELY ASSERTED (CPLR 3211(a)(5).**

- Be sure to assert a Counterclaim Under R.P.A.P.L. § 1501(4) in a timely answer: this is necessary if you want to cancel and discharge the loan.
- Include a claim for attorneys fees under N.Y.R.P.L. § 282(1).
- Some lenders claim that if a defendant wasn't properly served in a prior action, the loan wasn't accelerated. They are wrong.
- If lender claims to have revoked acceleration, look at evidence!

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## Quick Recap - Screening for Statute of Limitations Issues

Some Questions to Ask:

1) When did the borrower default? Was it more than six years ago?
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6) Has the bank commenced a new foreclosure action?
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## Questions?

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## Outline

- The 4 *Engel* cases
- General Foreclosure SOL Principles
- Acceleration
- Revocation
- Motions to Renew
- Questions



2

## The 4 *Engel* Cases

- *Vargas v. Deutsche Bank National Trust Co (1st Dep't)*
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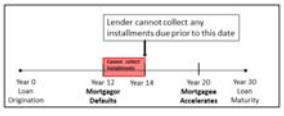




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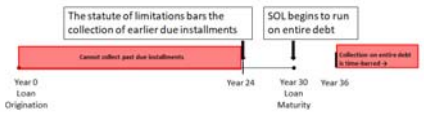




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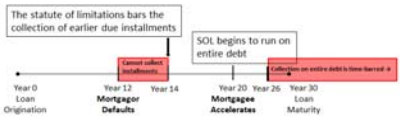




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## Acceleration

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## Acceleration

Acceleration is accomplished through an "unequivocal overt act" that notifies the borrower that the lender is demanding the total amount due under the loan.

Means of acceleration

- Filing a foreclosure action
- Pre-foreclosure notice to borrower demanding payment in full



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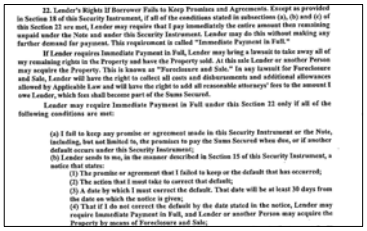
## Default Letters as Acceleration?



22. Lender's Rights If Borrower Fails to Keep Promises and Agreements. Except as provided in Section 18 of this Security Instrument, if all of the conditions stated in subsections (a), (b) and (c) of this Section 22 are met, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument. Lender may do this without making any further demand for payment. This requirement is called "Immediate Payment in Full."

If Lender requires Immediate Payment in Full, Lender may bring a lawsuit to take away all of my remaining rights in the Property and have the Property sold. At this sale Lender or another Person may acquire the Property. This is known as "Foreclosure and Sale." In any lawsuit for Foreclosure and Sale, Lender will have the right to collect all costs and disbursements and additional allowances allowed by Applicable Law and will have the right to add all reasonable attorneys' fees to the amount I owe Lender, which fees shall become part of the Sums Secured.

Lender may require Immediate Payment in Full under this Section 22 only if all of the following conditions are met:

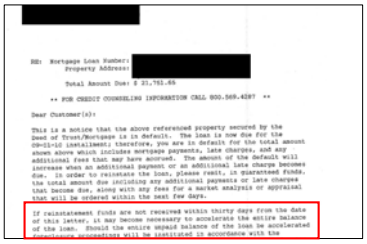
(a) I fail to keep any promise or agreement made in this Security Instrument or the Note, including, but not limited to, the promises to pay the Sums Secured when due, or if another default occurs under this Security Instrument;
(b) Lender sends to me, in the manner described in Section 15 of this Security Instrument, a notice that states:
(1) The promise or agreement that I failed to keep or the default that has occurred;
(2) The action that I must take to correct that default;
(3) A date by which I must correct the default. That date will be at least 30 days from the date on which the notice is given;
(4) That if I do not correct the default by the date stated in the notice, Lender may require Immediate Payment in Full, and Lender or another Person may acquire the Property by means of Foreclosure and Sale;

Nearly all mortgages contain a provision that a lender may accelerate—demand "immediate payment in full"—30 days after notifying the borrower of a default via a letter containing prescribed language. A default letter is not an acceleration, but may the expression of intent in the letter effect acceleration if the borrower fails to cure?



11

## Default Letters as Acceleration?



[redacted]

RE: Mortgage Loan Number: [redacted]
Property Address:
Total Amount Due: $ 21,751.65

** FOR CREDIT COUNSELING INFORMATION CALL 800.569.4287 **

Dear Customer(s):

This is a notice that the above referenced property secured by the Deed of Trust/Mortgage is in default. The loan is now due for the [illegible] installment; therefore, you are in default for the total amount shown above which includes mortgage payments, late charges, and any additional fees that may have accrued. The amount of the default will increase when an additional payment or an additional late charge becomes due. In order to reinstate the loan, please remit, in guaranteed funds, the total amount due including any additional payments or late charges that become due, along with any fees for a market analysis or appraisal that will be ordered within the next few days.

If reinstatement funds are not received within thirty days from the date of this letter, it may become necessary to accelerate the entire balance of the loan. Should the entire unpaid balance of the loan be accelerated foreclosure proceedings will be instituted in accordance with the

Before *Engel*, the Appellate Division consistently held that this language (conditional language such as "may") was insufficient to accelerate the loan because it was not unequivocal.

*E.g.*, *21st Mortg. Corp. v. Adames*, 153 A.D.3d 474, 474 (2d Dep't 2017).



12

## Default Letters as Acceleration?

NOTICE OF INTENT TO ACCELERATE

What about where the language is more definitive, such as here where the lender says that the loan "***will*** be accelerated" upon a certain due date?



13

## Default Letters as Acceleration?

*Vargas* gave the Court of Appeals the opportunity to resolve a Department split as to whether a statement that a loan "will be accelerated" unless the default is cured by a stated deadline effects acceleration.

1st Dep't: Yes

*Deutsche Bank v. Royal Blue Realty Holdings*

2d Dep't: No

*21st Mortg. Corp. v. Adames*



14

## *Vargas* Resolves Department Split

"We reject Vargas's contention that the [default] letter accelerated the debt." (P. 4.)

- "[T]he letter did not seek immediate payment of the entire, outstanding loan, but referred to acceleration only as a future event, indicating that the debt was not accelerated at the time the letter was written."
- "Nor was this letter a pledge that acceleration would immediately or automatically occur upon expiration of the 32-day cure period."



15

## Foreclosure Actions as Acceleration

Generally, the filing of a foreclosure complaint serves to accelerate the loan because, as part of the complaint, the plaintiff calls due the entire amount owed under the loan.

*Arbisser v. Gelbelman*, 286 A.D.2d 693, 694 (2d Dep't 2001).



16

## Ineffective Accelerations

Where a prior foreclosure action was dismissed because the plaintiff lacked standing, the plaintiff also lacked the authority to accelerate the loan.

*U.S. Bank Nat'l Ass'n v. Gordon*, 158 A.D.3d 832 (2d Dep't 2018).



17

## *Wells Fargo v. Ferrato*

- Case history
  - First Action: resolved after mod. Interest rate changed, $60,000 added to UPB
  - Second and Third Actions: Dismissed because the subjects of the complaints was the original mortgage, and not the mortgage and note as modified.
  - Fourth Action: Plaintiff discontinued to avoid traverse. (*More about this later)*



18

## *Wells Fargo v. Ferrato*

Fifth Action

- Ferrato argued that the Fifth Action was time-barred because the Second and Third Actions accelerated the amount due under the loan.



19

## *Wells Fargo v. Ferrato*

- The Court of Appeals held that "the filings did not accelerate the modified loan . . . Because the bank failed to attach the modified agreements or otherwise acknowledge those documents, which had materially distinct terms." (P. 4.)
- "Under these circumstances—where the deficiencies in the complaints were not merely technical or *de minimis* and rendered it unclear what debt was being accelerated—the commencement of these actions did not validly accelerate the modified loan."



20

## Revocation

21

## Revoking Acceleration

"A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action."

*NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 A.D.3d 1069, 1069-70 (2d Dep't 2017) (citing *EMC Mortg. Corp. v. Patella*, 279 A.D.2d 604, 606 (2d Dep't 2001).



22

## Revoking Acceleration

Revocation must occur "within the statute of limitations period" in order to be effective.

- *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (3d Dep't 2003).
- *Fed. Nat'l Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894 (2d Dep't 1994).



23

## Acts That Do Not Effect Revocation

- Dismissal of a foreclosure action by the court.
  - *Fed. Nat'l Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894 (2d Dep't 1994).
- Acceptance of partial payments after acceleration.
  - *UMLICVP, LLC v. Mellace*, 19 A.D.3d 684, 684 (2d Dep't 2005); *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (3d Dep't 2003).
  - However, partial payments *MAY* re-set the statute of limitations under Gen. Obligations Law § 17-107, if they are "accompanied by circumstances amounting to an absolute and unqualified acknowledgement of more being due, from which a promise may be inferred to pay the remainder." *Saini v. Cinelli Enters. Inc.*, 289 A.D.2d 770, 772 (3d Dep't 2001).



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## Acts That Do Not Effect Revocation

- Service of a 90-day notice under RPAPL §1304.
  - *Deutsche Bank Nat'l Trust Co. v. Adrian*, 157 A.D.3d 934, 935-36 (2d Dep't 2018).



25

## Effect of Discontinuance Pre-*Engel*

- Trial courts were briefly split as to whether a voluntary discontinuance served to revoke acceleration.
- However, the various departments of the Appellate Division addressing the issue consistently held that a discontinuance that was silent about revocation failed to revoke acceleration of the subject loan.



26

## Effect of Discontinuance Pre-*Engel*

- Prior case law held that, because an acceleration must be clear and unequivocal, revocation of acceleration must also clearly and unequivocally state that the lender will resume accepting installment payments.
- Proof of revocation could include mortgage statements or other correspondence
- Some decisions conveyed courts' skepticism about "de-acceleration notices," observing that absent an indication that periodic payments would be accepted, such notices may be pretexts to avoid the time-bar



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## *Engel* and *Naidu*

"A voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. Accordingly, we conclude that where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder." (P. 19.)



28

## *Engel* and *Naidu* – Acceleration By Complaint

"A voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. **Accordingly, we conclude that where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law**, absent an express, contemporaneous statement to the contrary by the noteholder." (P. 19.)



29

## *Engel* and *Naidu* – Acceleration By Complaint

"As is true with respect to the invocation of other contractual rights, either the noteholder's act constituted a valid revocation or it did not; what occurred thereafter may shed some light on the parties' perception of the event but it cannot retroactively alter the character or efficacy of the prior act." (P 17.)

"Rather, we are persuaded that, when a bank effectuated an acceleration via the commencement of a foreclosure action, a voluntary discontinuance of that action—*i.e.*, the withdrawal of the complaint—constitutes a revocation of that acceleration." (P 19.)



30

## *Engel* and *Naidu* – Acceleration By Complaint

Look for other acts of acceleration. Discontinuance only serves to revoke acceleration that was effected by filing the complaint.

- What else could have accelerated the loan?
  - Acceleration notice
  - Mortgage Statements



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This mortgage statement clearly indicates that the loan "has been accelerated."



32

## *Engel* and *Naidu* Express Statements to the Contrary

"A voluntary discontinuance withdraws the complaint and, when the complaint is the only expression of a demand for immediate payment of the entire debt, this is the functional equivalent of a statement by the lender that the acceleration is being revoked. Accordingly, we conclude that where acceleration occurred by virtue of the filing of a complaint in a foreclosure action, the noteholder's voluntary discontinuance of that action constitutes an affirmative act of revocation of that acceleration as a matter of law, **absent an express, contemporaneous statement to the contrary by the noteholder**." (P. 19.)



33

## *Engel* and *Naidu* Express Statements to the Contrary

*U.S. Bank v. Navarro*, 188 A.D.3d 1282 (2d Dep't 2020).

- First action filed Nov. 2009, discontinued Sept 2012
- Second action filed May 2012, dismissed Oct 2015
- Third action filed March 2016
- Trial court rejected argument that the September 2012 discontinuance could have revoked acceleration when the May 2012 action was already pending. (Not addressed on appeal.)



34

## *Engel* and *Naidu* Express Statements to the Contrary

*U.S. Bank N.A. v. Papanikolaw*, 62 Misc.3d 1207(A), 2019 N.Y. Slip Op. 50026(U) (Sup. Ct. Rockland Cty Jan. 2, 2019).

- Foreclosure action filed 2011, dismissed November 2016. Notice of appeal filed, but appeal ultimately withdrawn.
- Court held 2018 action untimely, and that putative revocation letter ineffective because it was sent *while* appeal of dismissal was still pending.



35

## Pretextual Revocations

*Milone v. U.S. Bank Nat'l Ass'n*, 164 A.D.3d 145, 154 (2d Dep't 2018).

> "Courts must, of course, be mindful of the circumstance where a bank may issue a de-acceleration letter as a pretext to avoid the onerous effect of an approaching statute of limitations."

See also *Wells Fargo Bank, N.A. v. Portu*, 179 A.D.3d 1204, 1207 (3d Dep't 2020).



36

## *Ferrato* and Pretextual Revocations

"As stated above, while a noteholder may be equitably estopped from revoking its election to accelerate, defendant Ferrato did not allege that she materially changed her position in detrimental reliance on the loan acceleration, and the courts conducted no equitable estoppel analysis. We reject the theory, argued by Ferrato and reflected in several decisions, that a lender should be barred from revoking acceleration if the motive of the revocation was to avoid the expiration of the statute of limitations on the accelerated debt. A noteholder's motivation for exercising a contractual right is generally irrelevant—but it bears noting that a noteholder has little incentive to repeatedly accelerate and then revoke its election because foreclosure is simply a vehicle to collect a debt and postponement of the claim delays recovery.." (P. 25.) (internal citations omitted.)



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## *Ferrato, Engel,* and Pretextual Revocations

- *Ferrato* and *Engel* dealt only with revocations of acceleration through discontinuance of action.* Purported revocations by notice may still be challenged:
  - Lender must still prove mailing
  - Letter must still clearly and unequivocally revoke acceleration by demanding the resumption of monthly payments.

*This is a minor update from the slide in your materials.



38

## ***Engel:*** No impact on cases where discontinuance was more than six years after acceleration

- *E.g., Federal Natl. Mtge. Assn. v Sajdak,* 2021 NY Slip Op 01393 (2d Dep't March 10, 2021) (action time-barred because defendant established prior foreclosure action was not discontinued until *after* expiration of six-year statute of limitations)



39

## Post *Engel:* Statute of Limitations Still Applicable for Installments that Accrued More than Six Years Prior

***E.g., U.S. Bank N.A. v Singer,* 2021 NY Slip Op 02013 (2d Dep't March 31, 2021) (motion for leave to amend to assert statute of limitations defense for mortgage installments that accrued more than six years prior to commencement of second action should have been granted and plaintiff was barred from recovery of time-barred installments even though as a result of *Engel* voluntary discontinuance of prior foreclosure action revoked acceleration. Complaint should have been partially dismissed to the extent it sought recovery of unpaid installments that accrued more than six years prior to commencement of the second foreclosure action).**



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## Motions to Renew: Can lenders undo prior dismissals of time-barred cases based on pre-*Engel* law?

- A motion to renew based on a change in the law must be made while the matter is still pending or "*sub judice*."
- A motion to renew is only timely if made *before* final judgment has been entered in the case, and the time to appeal that order or judgment has not yet expired.
- "Here, the case was no longer pending when plaintiff made his motion for leave to renew based on a change in the law, and we therefore conclude that the motion insofar as it sought leave to renew was untimely." *Redey v. Progressive Insurance Co.*, 158 A.D.3d 1208, 1209 (4th Dep't 2018).



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## Questions?

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New York Law Journal





COMMENTARY

# Enactment of the Foreclosure Abuse Prevention Act: A Guide for Practitioners

The “Foreclosure Abuse Prevention Act” restored settled statute of limitations law and provides much-needed certainty to New York’s property markets.

January 10, 2023 at 03:13 PM

Real Estate

By Jacob Inwald and Christopher Newton | January 10, 2023 at 03:13 PM

In the waning days of 2022, Gov. Kathy Hochul finally signed the Foreclosure Abuse Prevention Act, 2022 NY Sess. Laws of N.Y. Ch. 821 (A. 7737-B) (McKinney’s), which restored long-settled statute of limitations principles that were disturbed by recent appellate decisions that effectively permitted foreclosing lenders to unilaterally manipulate statutes of limitations that apply to all litigants, even Wall Street financial institutions.

There was a lot of hype about this legislation (which the legislature passed with strong bipartisan support) as part of the banking industry’s efforts to scare Hochul into vetoing it, but the truth is that the sky will not fall now that foreclosing lenders are once again bound by the same statute of limitations principles that govern all parties who pursue claims in court.

So, what does this legislation actually do? We describe some of the key features below.

3. **It creates a distinct CPLR 205-a grace period provision applicable to residential foreclosure cases, to address multiple foreclosure filings by plaintiffs who serially commence—and then neglect or discontinue—foreclosure actions.** Section 6 of the act limits the situations where foreclosing plaintiffs are entitled to the six-month grace-period to recommence a dismissed action and have it deemed timely. Under the act, this period is only available to “diligent” plaintiffs and not to those whose cases were dismissed for a broad range of neglectful behavior beyond the grounds contemplated by CPLR Rule 3216. In the words of the sponsor’s memo, this reigns in “judicial decisions that … have been overly indulgent of foreclosure plaintiffs whose cases have been dismissed for various forms of neglect.” (Assembly Mem in Support, Bill Jacket, L. 2022, Ch 821.)

5.

**Jacob Inwald** *is director of foreclosure prevention at Legal Services NYC, and* **Christopher Newton** *is director of the Homeowner and Consumer Rights Project of Queens Legal Services.*

2022 Sess. Law News of N.Y. Ch. 821 (A. 7737-B) (McKINNEY'S)

McKINNEY'S 2022 SESSION LAW NEWS OF NEW YORK

245th LEGISLATURE

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

CHAPTER 821
A. 7737–B

Approved and effective December 30, 2022

AN ACT to amend the real property actions and proceedings law, the general obligations law and the civil practice law and rules, in relation to the rights of parties involved in actions commenced upon real property related instruments

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

<< Note: NY RP ACT & PRO § 1301 >>

<< Note: NY GEN OBLIG § 17–105 >>

<< Note: NY CPLR §§ 203, 205, 213 >>

<< Note: NY CPLR Rule 3217 >>

<< Note: NY CPLR § 205–a >>

Section 1. Short title. This act shall be known and may be cited as the “foreclosure abuse prevention act”.

§ 2. Subdivision 3 of section 1301 of the real property actions and proceedings law, as added by chapter 312 of the laws of 1962, is amended and a new subdivision 4 is added to read as follows:

<< NY RP ACT & PRO § 1301 >>

3. While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, **including an action to foreclose the mortgage,** without leave of the court in which the former action was brought. **The procurement of such leave shall be a condition precedent to the commencement of such other action and the failure to procure such leave shall be a defense to such other action. For purposes of this subdivision, in the event such other action is commenced without leave of the court, the former action shall be deemed discontinued upon the commencement of the other action, unless prior to the entry of a final judgment in such other action, a defendant raises the failure to comply with this condition precedent therein, or seeks dismissal thereof based upon a ground set forth in paragraph four of subdivision (a) of rule thirty-two hundred eleven of the civil practice law and rules. This subdivision shall not be treated as a stay or statutory prohibition for purposes of calculating the time within which an action shall be commenced and the claim interposed pursuant to sections two hundred four and two hundred thirteen of the civil practice law and rules.**

  

**4. If an action to foreclose a mortgage or recover any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to foreclose the mortgage or recover any part of the same mortgage debt shall also be barred by the statute of limitations.**

§ 3. Subdivisions 4 and 5 of section 17–105 of the general obligations law are amended to read as follows:

<< NY GEN OBLIG § 17–105 >>

4. ~~Except as provided in subdivision five, no~~ **An** acknowledgment, waiver ~~or promise has any effect to~~ **, promise or agreement, express or implied in fact or in law, shall not, in form or effect, postpone, cancel, reset, toll, revive or otherwise** extend the time limited for commencement of an action to foreclose ~~or~~ **a** mortgage for any greater time or in any other manner than that provided in this section, ~~nor~~ unless it is made as provided in this section.

5. This section does not change the requirements~~,~~ or the effect with respect to the **accrual of a cause of action, nor the** time limited for commencement of an action~~, of~~ **based upon either:**

a. a payment or part payment of the principal or interest secured by the mortgage, or

b. a stipulation made in an action or proceeding.

§ 4. Section 203 of the civil practice law and rules is amended by adding a new subdivision (h) to read as follows:

<< NY CPLR § 203 >>

**(h) Claim and action upon certain instruments. Once a cause of action upon an instrument described in subdivision four of section two hundred thirteen of this article has accrued, no party may, in form or effect, unilaterally waive, postpone, cancel, toll, revive, or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the limitations period prescribed by law to commence an action and to interpose the claim, unless expressly prescribed by statute.**

§ 5. Subdivision (c) of section 205 of the civil practice law and rules, as amended by chapter 216 of the laws of 1992, is amended to read as follows:

<< NY CPLR § 205 >>

(c) Application. This section also applies to a proceeding brought under the workers' compensation law **but shall not apply to any proceeding governed by section two hundred five-a of this article**.

§ 6. The civil practice law and rules is amended by adding a new section 205–a to read as follows:

<< NY CPLR § 205–a >>

**§ 205–a. Termination of certain actions related to real property**

**(a) If an action upon an instrument described under subdivision four of section two hundred thirteen of this article is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, for violation of any court rules or individual part rules, for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, or upon a final judgment upon the merits, the**

  

**original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period. For purposes of this subdivision:**

**1. a successor in interest or an assignee of the original plaintiff shall not be permitted to commence the new action, unless pleading and proving that such assignee is acting on behalf of the original plaintiff; and**

**2. in no event shall the original plaintiff receive more than one six-month extension.**

**(b) Where the defendant has served an answer and the action upon an instrument described under subdivision four of section two hundred thirteen of this article is terminated in any manner, and a new action upon the same transaction or occurrence or series of transactions or occurrences is commenced by the original plaintiff, or a successor in interest or assignee of the original plaintiff, the assertion of any cause of action or defense by the defendant in the new action shall be timely if such cause of action or defense was timely asserted in the prior action.**

§ 7. Subdivision 4 of section 213 of the civil practice law and rules is amended by adding two new paragraphs (a) and (b) to read as follows:

<< NY CPLR § 213 >>

**(a) In any action on an instrument described under this subdivision, if the statute of limitations is raised as a defense, and if that defense is based on a claim that the instrument at issue was accelerated prior to, or by way of commencement of a prior action, a plaintiff shall be estopped from asserting that the instrument was not validly accelerated, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.**

**(b) In any action seeking cancellation and discharge of record of an instrument described under subdivision four of section fifteen hundred one of the real property actions and proceedings law, a defendant shall be estopped from asserting that the period allowed by the applicable statute of limitation for the commencement of an action upon the instrument has not expired because the instrument was not validly accelerated prior to, or by way of commencement of a prior action, unless the prior action was dismissed based on an expressed judicial determination, made upon a timely interposed defense, that the instrument was not validly accelerated.**

§ 8. Rule 3217 of the civil practice law and rules is amended by adding a new subdivision (e) to read as follows:

<< NY CPLR Rule 3217 >>

**(e) Effect of discontinuance upon certain instruments. In any action on an instrument described under subdivision four of section two hundred thirteen of this chapter, the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute.**

<< Note: NY RP ACT & PRO § 1301 >>

<< Note: NY GEN OBLIG § 17–105 >>

  

<< Note: NY CPLR §§ 203, 205, 213 >>

<< Note: NY CPLR Rule 3217 >>

<< Note: NY CPLR § 205–a >>

§ 9. Severability clause. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invali-date the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

<< Note: NY RP ACT & PRO § 1301 >>

<< Note: NY GEN OBLIG § 17–105 >>

<< Note: NY CPLR §§ 203, 205, 213 >>

<< Note: NY CPLR Rule 3217 >>

<< Note: NY CPLR § 205–a >>

§ 10. This act shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced.

**End of Document**