BCLP. Client Intelligent

Insights

NY COURT OF APPEALS ON THE FORECLOSURE STATUTE OF LIMITATIONS

Feb 23, 2021

SUMMARY

The New York Court of Appeals' decision last week, *Freedom Mortgage Corp v. Engel*, contains two "reliable and objective rules permitting consistent application of the statute of limitations."

What are those rules?

One, there must be an "unequivocal overt act" to accelerate indebtedness for a mortgage loan. A letter to the borrower stating that the "noteholder" will accelerate [his] mortgage with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings initiated at that time"' was not such an unequivocal overt act. *Engel*, at *3. In other words, a letter expressing a future intention was insufficient.

Two, absent express language to the contrary, the voluntary discontinuance by the lender of a foreclosure action will revoke the acceleration that was effectuated by the commencement of that foreclosure action. *Engel*, at *6. No post-revocation notice to the borrower that payments of monthly installments can be made is required. Thus, the lender will not be subject to a statute of limitations defense as the result of a discontinued foreclosure and will be able to re-accelerate and commence a new action to collect installments not more than six years past due.

The *Engel* Rules are Directly Applicable to Residential Foreclosures

The Court of Appeals stressed that these rules are based on the Fannie Mae standard mortgage form used in NY (Mortgage Form 3033 and Note Form 3233 and 3518) and that contractual language in different instruments may give rise to different conclusions. *Engel*, fn. 9.

And for Commercial Foreclosures?

Though the principles *Engel* establishes should certainly carry over to commercial foreclosures, *i.e.*, that an overt act is required to accelerate and that an acceleration may be revoked by the voluntary

discontinuance of the action, as a practical matter, *Engel* will change little in the world of commercial foreclosures. First, the statute of limitations to enforce a note or mortgage in New York is six years. It is rare that commercial lenders run up against that deadline, even with forbearances. It is much more common in the residential arena where there have been a series of moratoria, rule changes and evidentiary issues clarified in recent court rulings, and often changes in loan servicers, that may require re-starting a case. However, as there has now been a moratorium for a year preventing the commencement of commercial foreclosures, that may change. **Governor Cuomo's Executive Order 202.95 just extended the moratorium for another thirty days – to March 24, 2021**.

Also, pre-foreclosure notices differ in commercial cases from the examples discussed in *Engel*. In our experience, most commercial lenders (either because the commercial loan documents require it, or as a matter of practice) generally issue a pre-foreclosure acceleration notice that is clear and unequivocal and that it is immediately effective. Given Engel's holding, lenders should consider having their counsel review their current forms so that they are clear on their effect.

In addition, Engel is limited to a circumstance where the lender effectuated the acceleration via the commencement of the action. *Engel*, at *6. It does not decide whether the discontinuance of a foreclosure action revokes acceleration invoked by a lender's pre-foreclosure acceleration notice.

Remaining Open Questions:

Engel, though it does answer clearly two questions leaves open several others:

1) whether an involuntary dismissal by the Court of the earlier foreclosure action is also effective to de-accelerate the loan.

2) The *Engel* Court assumed that the noteholders had a right to revoke the acceleration; that was not disputed by the parties to the cases (some of the *amici* had argued that the acceleration was irrevocable). The concurring opinion of Justice Wilson and the dissent of Justice Rivera made clear their view that this issue was not decided by the decision because it had not been preserved for review.

3) The court notes that there may be cases where the operative facts surrounding a purported acceleration or revocation are disputed and the court may be unable to decide whether the statute of limitations had run as a matter of law (*see Engel*, fn. 9).

Practice Tips:

- Pre-foreclosure acceleration notices should be reviewed with *Engel's* cautions in mind.
- When discontinuing a foreclosure action, expressly revoke any prior acceleration.
- Consider statute of limitations tolling agreements when forbearing.

- When evaluating time bars, consider the impact of statutory stays, such as a bankruptcy filing or death of a party.

RELATED PRACTICE AREAS

- Real Estate Disputes

MEET THE TEAM

Suzanne M. Berger

New York

suzanne.berger@bclplaw.com
+1 212 541 2034

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.

© 2024 Bryan Cave Leighton Paisner LLP.