The Effect of a Discontinuance on the Mortgage Foreclosure Statute of Limitations Period

By Christopher A. Gorman and James Wighaus

Pursuant to CPLR 213(4), the statute of limitations in a mortgage foreclosure action is six years. Once the mortgage debt is accelerated, the entire amount of the debt is due, and the statute of limitations begins to run from the date of acceleration. The commencement of a foreclosure action itself constitutes an acceleration of the debt. As a general rule, a lender may revoke its election to accelerate the mortgage by an affirmative act of revocation occurring before the six-year statute of limitations period has lapsed. Until recently, the courts were split on the issue of whether a lender's decision to discontinue a foreclosure action constituted an affirmative act of revocation.

In *NMNT Realty Corp. v. Knoxville 2012 Trust*,[i] the Appellate Division, Second Department addressed the above issue. The *NMNT Realty Corp.* decision is likely to spawn substantial discovery and motion practice in a number of mortgage foreclosure cases where the statute of limitations issue is being litigated.


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NMNT Realty Corp. decision

In *NMNT Realty Corp.*, on July 27, 2006, a predecessor lender commenced a mortgage foreclosure action on the basis of the mortgagors' alleged failure to make certain monthly payments under the subject promissory note and mortgage. In the complaint, the predecessor lender expressly stated that the predecessor lender elected to declare immediately due and payable the entire unpaid principal balance of the mortgage debt.

Subsequently, the predecessor lender filed a motion seeking to discontinue the action, which the Supreme Court granted by an order dated September 22, 2011. In February 2012, the plaintiff in the case purchased the property from the mortgagors (hereinafter, "Borrowers"). The mortgage and promissory note were assigned to the defendant in the case, Knoxville 2012 Trust (hereinafter, "Lender").

In May 2013, the Borrowers commenced an action against the Lender pursuant to RPAPL §1501(4), which provides that where the statute of limitations for a foreclosure action has expired, any person with an estate or interest in the property 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." The Borrowers sought an order canceling and discharging of record the mortgage on the grounds that any action to foreclose was barred by the statute of limitations.

The Lender filed a motion for summary judgment and the Borrowers filed a cross-motion for summary judgment. After the Supreme Court denied both on appeal, the Appellate Division, Second Department affirmed. The Appellate Division, Second Department stated that the Borrowers had met their *prima facie* burden on a motion for summary judgment by submitting a copy of the verified complaint from the prior foreclosure action, which the court concluded "established that the mortgage debt was accelerated on or about July 27, 2006." The six-year statute of limitations, therefore, had expired by the time the plaintiff commenced the new action on May 16, 2013.

The Lender submitted evidence in opposition to the Borrowers' cross-motion showing proof that the predecessor lender "moved for, and on September 22, 2011, was granted, an order that discontinued the foreclosure action, canceled the notice of pendency and vacated the judgment of foreclosure and sale it had been granted." The Appellate Division, Second Department concluded that the Lender "raised a triable issue of fact" as to whether the motion to discontinue the prior foreclosure action "constituted an affirmative act by the lender to revoke its election to accelerate."

The Borrowers argued that, because the prior foreclosure action was dismissed by the court, and never withdrawn by the predecessor lender, there was not an affirmative act by the lender

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to revoke its acceleration. The Appellate Division, Second Department rejected this argument, concluding that "[t]he Supreme Court properly found that the mortgagors' conclusory statements that the 'Order of Discontinuance was the result of procedural deficiencies in the proceedings,' . . . do not disprove an affirmative act of revocation."

Impact of the NMNT Realty decision

Respectfully, the decision of the Appellate Division can, at best, be described as somewhat awkward. It appears that what the Appellate Division did is allow borrowers to "re-litigate" the prior foreclosure action to ascertain what the lender's intent may have been in discontinuing the action. *NMNT Realty* left open the question of whether and under what circumstances a court can conclude that the lender's true intention in seeking to discontinue the prior foreclosure action stemmed from a procedural irregularity that was discovered in the prior proceeding and not from any intention on the part of the lender to actually revoke the acceleration of the debt.

Based upon *NMNT Realty*, one can expect that lenders, in moving to voluntarily discontinue foreclosure actions, will include a statement in their motion papers indicating that the motion to discontinue constitutes a revocation of the acceleration of the debt. However, such statements may not necessarily be dispositive of a lender's true intention in seeking to discontinue. Thus, the unintended consequence of the *NMNT Realty* decision may be that there ends up being discovery in mortgage foreclosure cases into a lender's true intentions where the question is raised regarding why a lender may have filed a motion seeking to discontinue a prior foreclosure action.

For instance, it is possible that deposition discovery or interrogatories can reveal that the lender discovered a procedural irregularity in the prior foreclosure proceeding, and that fact weighed in to some degree on the predecessor lender's decision to discontinue the prior foreclosure action. *NMNT Realty* does not explain how lower courts should address such a factual scenario – *i.e.*, where the lender may have had the intention of trying to discontinue a procedurally improper case. *NMNT Realty*, therefore, may engender a great deal of discovery and motion practice in mortgage foreclosure litigation where statute of limitations issues are raised by the borrowers and the intention of discontinuing prior foreclosure litigation is put at issue.

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Discoverability of Condemnor's Pre-Vesting Appraisal *(Continued from page 8)*

what condemnee is representing to such third party as the amount of "just compensation" it will have to pay for acquisition of the subject property.

Absent either of the circumstances above described, the court will be unaware of what the condemnor has previously adopted as its "highest approved appraisal." But then the effects of the body of case law which otherwise excludes discovery and/or use by condemnee against condemnor of an appraisal despite its adoption by condemnor as its "highest approved appraisal as required by both Sections 303 and 304 of the EDPL is an open invitation to condemnors to avoid the constitutional mandate of just compensation in the name of budget economy or to seek to "punish" the condemnee who would contest its original offer. We do not submit here that an offer of settlement by either party is admissible or should in any way be before the court at the time of trial and certainly condemnor is not restrained by the Eminent Domain Procedure Law or any other statute for making an offer of settlement which may exceed its "highest approved appraisal" and certainly that offer of settlement should not be before the trial court. But the case law as it now stands is an inducement to condemnor to seek out appraisers for purposes of trial who had not been involved in preparation of what has been previously represented by condemnor as its "highest approved appraisal," which are substantially below the appraisals mandated by Section 303 and, thus, creating a threat to condemnee that if it challenges the offer made by condemnor pursuant to Section 303, condemnee will run the risk (litigation is always a risk) of having to return with interest a portion of the advance payment made pursuant to EDPL § 304. Is that just compensation?

If a criminal prosecutor were to suppress evidence that might favor the position of a defendant in the hope of securing either a conviction or a confession, he would be removed from office. He who litigates with the state or challenges the state is entitled to the benefit of all that is in support of his position. The state should not be allowed to suppress anything. Should the constitutional right to "just compensation" be subject to a lesser standard? We respectfully submit that to require a condemnor at the very outset to prepare an appraisal of the damages that it will inflict and that such appraisal is required to be the "highest approved appraiser" and, thus, represents condemnor's opinion of what represents "just compensation" and then in the event of a contest to permit the condemnor to submit a lesser appraisal and suppress the content of that "highest approved appraisal," is in effect a denial of just compensation and a violation of the constitutional rights of the owner whose property has been appropriated or condemned for a public purpose. It, in effect, turns the quest for just compensation into a game of chance, in which the "house" is the condemnor.

To sum up: Both the State and Federal constitutions requires that when private property is acquired by eminent domain, that the owner thereof receive just compensation. New York Eminent Domain Procedure Law requires that condemnor obtain an appraisal and offer to the owner the amount of its "highest approved appraisal," which is then what the condemnor at that point represents to be just compensation. But if the owner does not believe that this represents just compensation, condemnor must nevertheless pay the sum represented by the highest approval appraisal as an advance payment. The condemnor is then permitted to suppress knowledge of that "highest approved appraisal" and file with the court for purposes of trial an appraisal of a lesser sum than its "highest approved appraisal;" thus threatening the property owner with the prospect of having to return some portion with interest of what has been previously represented as condemnor's highest approval appraisal and the just compensation to which the owner is entitled. Can this possibly represent just compensation?

Note: Edward Flower was admitted to the practice of law in New York State in April 1956 and has practiced since that time (62 years). He served as an Assistant County Attorney specializing in eminent domain matters and upon leaving that office in 1966, he has continued in that field to the present. Although he is 88 years of age, he continues to try eminent domain matters both in the New York State Court of Claims and the Supreme Court.

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ing clients with minor children, given the toll divorce trials often have on young children.

Looking back on her earlier Pro Bono Project referrals, Ms. Brown is grateful for the opportunity they created for her to become acquainted with judges she had not yet appeared before. She finds the Project referrals to be a good way to build relationships with judges because they appreciate the pro bono service she is providing. Ms. Brown encourages other attorneys not currently accepting Project referrals to do so, commenting, "Lawyers who don't do pro bono are missing out on the complete calling of our profession."

Debra Brown and her wife Sherry Mederos have a large family consisting of three sons and ten grandchildren. In her spare time, Ms. Brown can be found boating and fishing off the South Shore.

The Pro Bono Project is extremely pleased to honor Debra Brown as the Pro Bono Attorney of the Month in light of the generous services she has provided to her pro bono clients over the years. We look forward to our continued work together on behalf of those in need for many years to come.

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Note: Ellen Krakow is the Suffolk Pro Bono Project Coordinator for Nassau Suffolk Law Services.