

New York is Split on Whether Notice of Default Letters Trigger the Statute of Limitations

3 min read

Aug 24, 2018

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In [*Milone v. US Bank, N.A.*](#), a New York intermediate appellate court held that a letter to a borrower stating that the failure to cure a mortgage loan default “will result in acceleration” does not start the clock on the statute of limitations to foreclose and recover the entire debt. This ruling differs from that of another New York intermediate appellate court, which had ruled otherwise, setting up the possibility of the New York Court of Appeals weighing in on a key issue in New York foreclosure actions.

Second Department Holds that Notice of Default Letter Stating “Future Intent” to Accelerate Does Not Start Running of Statute of Limitations. *Milone* stemmed from the plaintiff-borrower’s failure to make the October 1, 2008 payment due on her mortgage loan—or any subsequent payments. As a result, the servicer sent the borrower a notice of default letter, dated November 16, 2008, providing that her failure to cure her default within 30 days “will result in acceleration” of her loan. Subsequently, on January 13, 2009, US Bank commenced a foreclosure action against the borrower, which was dismissed in February 2012 without US Bank establishing it had standing.

Nothing further happened with respect to the loan until October 21, 2014, when the servicer sent the borrower a letter stating that it was de-accelerating the loan and re-instituting the borrower’s monthly payment obligation. Several months later, in March 2015, the borrower commenced an action seeking to cancel and discharge the mortgage and note based on the expiration of the six-year statute of limitations to foreclose and recover the entire amount owed on the loan. The borrower alleged that the November 16, 2008 letter accelerated her loan and thus started running New York’s six-year statute of limitations. Alternatively, she asserted that the clock started to run when US Bank commenced the foreclosure action on January 13, 2009. US Bank moved to dismiss the complaint, arguing that the statute of limitations had not run because the October 21, 2014 letter de-accelerated the loan within the six-year period. The lower court agreed with US Bank and dismissed the action.

On appeal, the Second Department held that the November 16, 2008 letter had not accelerated the loan, and thus had not started the running of the statute of limitations on the entire debt. The court reasoned that the language in the letter—providing that the failure to cure the default within 30 days “will result in acceleration” of the loan—was an expression of future intent that did not amount to an actual acceleration. As there was no acceleration, the statute of limitations to recover the entire debt and foreclose had not started to run.

De-Acceleration of the Loan Also Addressed. The court held that a lender could de-accelerate a mortgage loan because its right to accelerate was discretionary. In addition, the court determined that the de-acceleration letter was in a proper form because it contained an unequivocal demand that the borrower meet her prospective monthly payment obligations. But, the court held that just as a party has to establish it has standing to foreclose, so too does a party have to establish it has standing to de-accelerate a loan. As there was an open question as to US Bank’s standing, it was not entitled to dismissal of the action.

Going Forward – Headed for Court of Appeals? As the court noted in *Milone*, there is now a split between the Appellate Division, First Department and Second Department in New York as to whether stating that the failure to cure “will result in acceleration” starts the clock on the statute of limitations. Given this split among the intermediate appellate courts on this important issue, it may be addressed by the Court of Appeals. For now, however, lower courts in the Second Department—including courts in Kings, Nassau, Queens, Suffolk and Westchester counties—are bound by *Milone*. Loan holders in those courts now have a favorable decision to defeat arguments by borrowers that notice of default letters stating a future intent to accelerate the loan start running the statute of limitations to foreclose and recover the entire debt.

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