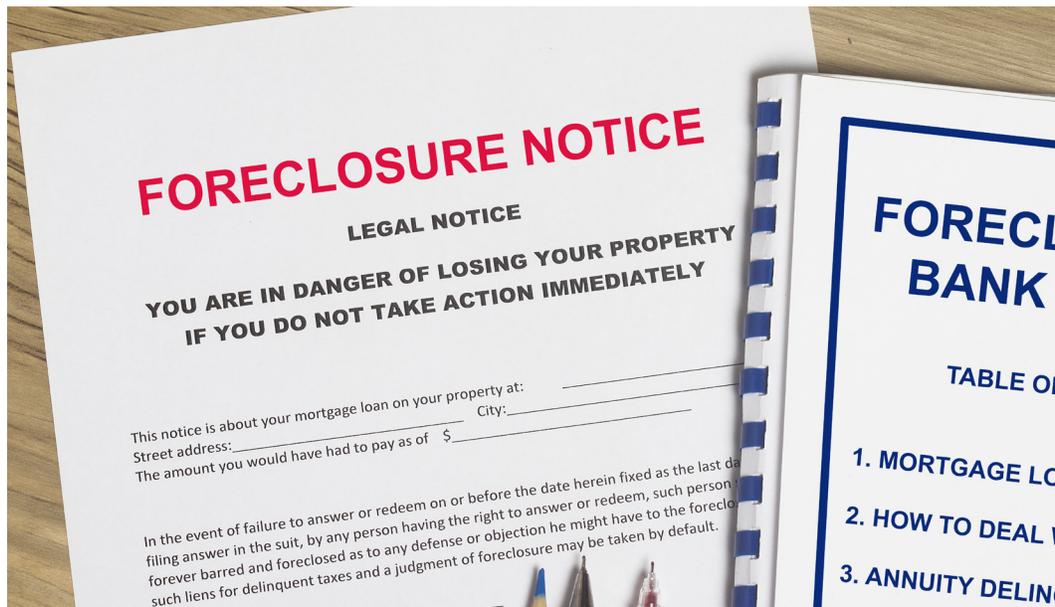


New York Appellate Court Decision Provides Guidance for Lenders in Foreclosure Actions



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The New York Appellate Division for the Second Department recently issued a ruling that makes it more difficult for mortgage holders to foreclose on certain properties. In *U.S. Bank Trust, N.A. v. Aorta* (available at: <http://www.courts.state.ny.us/courts/ad2/Handdowns/2018/Decisions/D57566.pdf>), the court determined that a mortgage holder's voluntary discontinuation of a foreclosure action is not an effective way to revoke the acceleration of a mortgage debt, and therefore does not halt the six-year statute of limitations to bring a foreclosure action.

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New York Foreclosure Law

Under New York law, an action to foreclose a mortgage is subject to a six-year statute of limitations from the time of the mortgage debt acceleration. When a consumer defaults on his or her mortgage, it will generally trigger a debt acceleration clause in the mortgage agreement, making the entire remaining amount immediately due. The mortgage holder could then choose to demand instant payment, work out a new repayment plan with the individual, conduct some other form of loss mitigation with the consumer, or begin foreclosure proceedings. The foreclosure action must begin within the six-year period from the mortgage acceleration, even if the mortgage holder entered into a form of loss mitigation with the consumer, unless the mortgage holder revokes its election to accelerate the mortgage debt via an affirmative act of revocation within the six-year statute of limitations period.

U.S. Bank Trust, N.A. v. Aorta

In this case, the mortgage holder's predecessor in interest commenced an action against a borrower to foreclose a mortgage in May 2008. That action was voluntarily discontinued, and a new foreclosure action was initiated on the property in August 2014 (more than six years after the original action).

The borrower argued that the new action was time-barred by the six-year statute of limitations. The mortgage holder asserted that, when it voluntarily discontinued the 2008 foreclosure and served various notices on the borrower, including statutory pre-foreclosure notices, it also effectively revoked the prior acceleration of the mortgage debt.

The court agreed with the borrower and held that the 2014 foreclosure action was time-barred. The court found that the lender's voluntary dismissal "was insufficient, in itself, to evidence an affirmative act to revoke the election to accelerate the mortgage debt." Additionally, the court found that serving the various notices on the borrower was insufficient evidence of an affirmative act of revocation. Therefore, since the mortgage holder failed to revoke its election to accelerate the mortgage debt within the six-year limitations period, the 2014 foreclosure action was time-barred.

Although the court held that the voluntary dismissal was insufficient here, it suggested that a voluntary discontinuance with language indicating a mortgage holder's intent to revoke its election to accelerate may be enough to constitute an affirmative act of revocation. As the court noted, "nothing in the [voluntary dismissal] itself served to

destroy the effect of the sworn statement that the plaintiff's predecessor in interest had elected to accelerate the maturity of the debt." Thus, had the mortgage holder included language in its notices to demonstrate its intent to revoke its predecessor in interest's election to accelerate the mortgage debt, the court may have reached a different determination.

Pepper Points

- In light of the *Aorta* decision, mortgage holders in New York cannot merely rely on a voluntary discontinuance of a foreclosure action as evidence of their intent to revoke the acceleration of mortgage debt.
- Consequently, when discontinuing a foreclosure action, lenders would be wise to include language clearly indicating their intent to also revoke their election to accelerate the mortgage debt.
- New York is not the first state to make it easier for the statute of limitations to toll on foreclosure actions, and the trend appears to be leaning towards the borrower, unless the mortgage holder explicitly revokes the election to accelerate the mortgage debt.