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THE PIB REPORT

New York's Appellate Division Holds that "Will Accelerate" Language in Pre-Foreclosure Notice Does Not Constitute an Acceleration of the Mortgage Debt

In 21st *Mortgage Corp. v. Adames,* --- N.Y.S.3d ---, 2017 WL 3273409 (2d Dept. Aug 2, 2017), New York's Appellate Division, Second Department held that the phrase "will accelerate", in a pre-foreclosure notice of default, does not accelerate a mortgage loan, but merely describes a possible future event. The decision also confirmed that the filing of a complaint by a plaintiff who lacked authority to accelerate the debt, or to sue to foreclose at that time, does not accelerate the loan either.

By way of background, on April 11, 2006, Leandro Adames ("Borrower") executed a note and mortgage to Argent Mortgage Company, LLC ("Argent"). Argent assigned the note and mortgage to Residential Funding Company, LLC ("RFC"). The property was thereafter acquired by Vista Holdings, Inc. ("Vista"). On February 13, 2007, Argent filed a foreclosure complaint against the Borrower. That action was dismissed for lack of standing. On May 1, 2014, RFC issued a corrective assignment to Wilmington Savings Fund Society, FSB ("Wilmington"). Subsequently, plaintiff 21st Mortgage Corporation – as mortgage loan servicer for Wilmington – commenced this second foreclosure action. Vista answer the complaint, raising statute of limitations, lack of standing, and lack of capacity to sue as affirmative defenses. Plaintiff moved, among other things, for summary judgment on the complaint against Visa. The Supreme Court denied that branch of plaintiff's motion.

On appeal, the Second Department held that the Supreme Court erred, to the extent it denied plaintiff's motion based upon a conclusion that there were issues of fact as to whether the action was time-barred. The Second Department first observed that, "[a]s a general matter, an action to foreclose a mortgage may be brought to recover unpaid sums which were due within the six-year period immediately preceding the commencement of the action (*Wells Fargo Bank, N.A. v. Burke*, 94 AD3d 980, 982; *see* CPLR 213[4]). However, 'even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt'(*Wells Fargo Bank, N.A. v. Burke*, 94 AD3d at 982, quoting *EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, 605)."

As applied to this case, the Second Department found that the notice of default dated December 13, 2006, sent to the Borrower prior to the commencement of the 2007 action, was "nothing more than a letter discussing acceleration as a possible future event, which does not constitute an exercise of the mortgage's optional acceleration clause (*see Goldman Sachs Mtge. Co. v. Mares*, 135 AD3d 1121, 1122-1123; *see generally Wells Fargo Bank, N.A. v. Burke*, 94 AD3d at 982-983)." Further, "the commencement of the 2007 action was ineffective to constitute a valid exercise of the option to accelerate the debt since the plaintiff in that action did not have the authority to accelerate the debt or to sue to foreclose at that time (*see Wells Fargo Bank, N.A. v. Burke*, 94 AD3d at 983; *EMC Mtge. Corp. v. Suarez*, 49 AD3d 592)."

The *Adames* decision does not actually describe the language contained in the notice of default. PIB, however, obtained a copy of the notice from the publicly available file. The notice provides: "If you have

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not cured the default within forty five (45) days of this notice, Litton ***will accelerate*** the maturity date of the Note and declare all outstanding amounts under the Note immediately due and payable." (emphasis added) ■

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Circuit Split Over SEC Administrative Law Judges Sets the Table for Supreme Court Review

In June 2017, in *Raymond J. Lucia, et al. v. SEC,* Case No. 15-1345, the D.C. Circuit, sitting *en banc,* denied a petition challenging the constitutionality of the SEC's appointment of administrative law judges ("ALJs"). The D.C. Circuit's decision comes on the heels of the Tenth Circuit's conflicting decision in *Bandimere v. SEC,* Case No. 15-9586, which held that the SEC's appointment of ALJs violated the Appointments Clause in Article II, section 2 of the U.S. Constitution. The issue raised by the conflicting decisions among the D.C. and Tenth Circuits may be heard next year by the Supreme Court – indeed, in *Lucia*, the defendant has already filed a petition for writ of certiorari.

The arguments considered in *Lucia* and *Bandimere* turn on whether the SEC's ALJs are "officers" for purposes of the Appointments Clause, and in particular, "inferior" officers who may be appointed by heads of departments – such as the chair of the SEC. If they are "officers" under the Appointments Clause, then their appointment is likely unconstitutional since the SEC's ALJs are appointed through an administrative process in-house, rather than through appointment by the President or the "head of the department." In finding that the ALJs were not officers, the panel in *Lucia* found that the ALJs do not exercise significant authority because they lack the power to issue final decisions. By contrast, the panel in *Bandimere* explained that SEC ALJs "exercise significant discretion while performing 'important functions' that are 'more than ministerial tasks.'" Those functions include the power to conduct hearings, regulate document production and depositions, receive evidence, rule on the admissibility of evidence, rule on dispositive motions, issue subpoenas, and preside over trial-like hearings.

Although the constitutional flaw could likely be cured by having the SEC commissioners issue an appointment, or simply preside over the matters themselves, that has not occurred. One reason may be, the SEC might be reluctant to change its appointment procedures, as that might be construed as an admission that previous appointments were unconstitutional. Not only would that create a ripple effect on current and prior cases before the SEC ALJs, but such a concession could impact other federal agencies and the appointment processes of their administrative law judges.

In light of the circuit split and the uncertainty surrounding this Constitutional question, the Supreme Court is likely to take up the issue next term. But until then, more and more challenges to the SEC's ALJs are inevitable. ■

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