VOLUNTARY DISCONTINUANCES OF PRIOR FORECLOSURE ACTIONS AND THE RELATED CORRESPONDENCE DID NOT UNAMBIGUOUSLY DE-ACCELERATE THE DEBT; THEREFORE THE FORECLOSURE ACTION IS TIME-BARRED; TWO-JUSTICE DISSENT ARGUED THE CORRESPONDENCE DE-ACCELERATED THE DEBT (THIRD DEPT).

The Third Department, reversing Supreme Court, over a two-justice dissent, determined the foreclosure action was time-barred. The initial foreclosure action was in 2010. That action was discontinued and the mortgage was subsequently assigned three times. After a second discontinuance, the third foreclosure action was commenced in 2017. The majority concluded that the discontinuances and related correspondence did not de-accelerate the debt, so the statute of limitations kept running from the initial action in 2010. The dissenters argued the debt had been de-accelerated by correspondence with the defendant:

> ... [T]he voluntary discontinuance of the first two actions, without more, did not constitute an affirmative revocation of the initial acceleration of the debt ... . That is particularly so because plaintiff's predecessors in interest moved to discontinue each action due to title concerns, without addressing the prospect of revoking the acceleration and resuming installment payments ... . * * *
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> [The plaintiffs'] letters do not indicate a clear and unambiguous return to an installment payment plan and, for all practical purposes, do not actually evidence any real intent to de-accelerate the loan. In effect, "plaintiff simply put defendant[s] on notice of its obligation to cure a . . . default and then promptly embarked on the notices required to initiate a [third] foreclosure action" ... . In our view, these notices do not constitute affirmative actions to de-accelerate the mortgage ... . U.S. Bank Natl. Assn. v Creative Encounters LLC, 2020 NY Slip Op 02844, Third Dept 5-14-20

PROOF OF DEFENDANTS' DEFAULT IN THIS FORECLOSURE ACTION WAS NOT IN ADMISSIBLE FORM; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The evidence of defendants' default was not in admissible form:

> To establish its prima facie entitlement to summary judgment in a mortgage foreclosure action, a plaintiff must submit the mortgage, the unpaid note, and evidence of the mortgagor's default ... . A default is established by (1) an admission made in response to a notice to admit, (2) an affidavit from a person having personal knowledge of the facts, or (3) other evidence in admissible form ... .
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> Here, Ostermann [plaintiff's vice president], in her affidavit, did not specifically state that she had personal knowledge of the default. Moreover, to the extent that her knowledge was based on her review of business records, she did not identify what records she relied on and she did not attach them to her affidavit. Thus, the plaintiff failed to submit evidence in admissible form to establish the defendants' default ... . Since the plaintiff failed to establish, prima facie, that the defendants had defaulted on the subject note, the Supreme Court should have denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their answers, and for an order of reference ... . Deutsche Bank Natl. Trust Co. v McGann, 2020 NY Slip Op 02765, Second Dept 5-13-20

BECAUSE THE HOLDER OF A FIRST MORTGAGE WAS A DEFENDANT IN THE TAX FORECLOSURE PROCEEDINGS, THE MORTGAGE HOLDER DID NOT NEED TO FILE ITS OWN FORECLOSURE ACTION TO ENFORCE ITS LIEN ON THE SURPLUS TAX-FORECLOSURE-SALE PROCEEDS (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Scheinkman, determined that HPD, the holder of a first mortgage on property which was the subject of a tax foreclosure, was entitled to the surplus funds from the tax foreclosure sale. The issue was whether HPD's action seeking the surplus was time-barred because it didn't enforce the lien on the surplus within six years of the tax foreclosure sale. The Second Department held no further action to enforce the lien was necessary because HPD was a defendant in the tax foreclosure proceedings:

> ... HPD's appearance in the tax lien foreclosure action put [the property owner] and anyone else interested in a potential surplus on

notice of HPD's claims. To require HPD to commence a separate foreclosure action, when an action to foreclose the tax lien was already pending, would serve no useful purpose. NYCTL 1997-1 Trust v Stell, 2020 NY Slip Op 02802, Second Dept 5-13-20

THE NOTICES INFORMED DEFENDANTS THAT THE MORTGAGE PAYMENTS ACCELERATED ON JANUARY 21, 2011; THE FACT THAT NOTICES REITERATING THAT SAME ACCELERATION DATE WERE SENT AS LATE AS NOVEMBER 2013 DID NOT CHANGE THE OPERATIVE DATE; THE FORECLOSURE ACTION COMMENCED IN MARCH 2017 WAS TIME-BARRED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the mortgage payments were accelerated on January 21, 2011. The defendants were notified of the acceleration date in December 2010. Additional notices were sent to defendants as late as November 2013, but all the notices reiterated that January 21, 2011 was the acceleration date. The foreclosure action commenced in March 2017 was deemed time-barred:

> The December 2010 notice stated that, on January 21, 2011, "the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." Between July 2012 and November 2013, five additional notices were sent to defendants, each reiterating that "[t]he acceleration date of January 21, 2011 . . . remains in effect." * * *
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> ... [T]he December 2010 notice states that, "[i]f the default is not cured on or before January 21, 2011, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." This language, particularly the underlined language in the notice, indicates the date on which the debt was to be accelerated. A plain reading of the notice does not provide any suggestion that, except for curing the default, the outstanding debt would not be accelerated on that date. As such, the notice clearly and unequivocally indicates that the outstanding mortgage payments would be accelerated on January 21, 2011 ... . The reiteration of this acceleration date in five subsequent letters only further evinces the acceleration date of January 21, 2011 ... . MTGLQ Invs., LLP v Lunder, 2020 NY Slip Op 02690, Third Dept 5-7-20

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 13O4 AND A CONDITION PRECEDENT IN THE MORTGAGE IN THIS FORECLOSURE ACTION; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with the notice requirements of RPAPL 1304 and a condition precedent in the mortgage and therefore was not entitled to summary judgment in this foreclosure action:

> Here, the plaintiff failed to establish, prima facie, that it complied with the requirements of RPAPL 1304 ... . Contrary to the plaintiff's contention, its submission of an affidavit of an employee of the loan servicer was not sufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304. The affiant did not aver that he had personal knowledge of the purported mailings, that he was familiar with the mailing practices and procedures of the plaintiff, which allegedly sent the notice, or that the plaintiff's records had been incorporated into the records of the loan servicer and were routinely relied upon by the loan servicer in its business ... . Further, the plaintiff's submission of an affidavit of its own employee was insufficient to establish the plaintiff's strict compliance with RPAPL 1304, since that employee had no personal knowledge of the purported mailings, and his unsubstantiated and conclusory statements failed to establish that the notice was mailed to the defendant not only by certified or registered mail, but also by first-class mail ... . Although the plaintiff submitted tracking information from the United States Postal Service for certified mailings of the notice, the redacted proof of first-class mailing did not contain any information linking a first-class mailing to the RPAPL 1304 notice, and thus, failed to establish that the notice was mailed by first-class mail ... . Likewise, the plaintiff's submission of a "Proof of Filing" statement pursuant to RPAPL 1306 contained no information indicating that the mailing was done by both registered or certified mail and first-class mail as required by RPAPL 1304 ... .
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> The plaintiff similarly failed to establish, prima facie, that it mailed a notice of default to the defendant by first-class mail as required by the terms of the mortgage as a condition precedent to acceleration of the loan ... . JPMorgan Chase Bank, N.A. v Nellis, 2020 NY Slip Op 02621, Second Dept 5-6-20

Similar issues and result in Deutsche Bank Natl. Trust Co. v Nelson, 2020 NY Slip Op 02604, Second Dept 5-6-20

PLAINTIFF DID NOT HAVE AN EXCUSE FOR FAILING TO MOVE FOR A DEFAULT JUDGMENT FOR FOUR YEARS; THE ACTION WAS DISMISSED AS ABANDONED WITH NO NEED TO CONSIDER WHETHER THE ACTION WAS MERITORIOUS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's failure to timely seek a default judgment in this foreclosure action required the action to be dismissed as abandoned. Plaintiff's failure to offer an adequate excuse mandated dismissal without considering whether plaintiff had a meritorious action:

> ... [T]he Supreme Court should have granted that branch of the defendant's cross motion which was pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against her as abandoned. CPLR 3215(c) provides, inter alia, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, . . . unless sufficient cause is shown why the complaint should not be dismissed." "To establish sufficient cause,' the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action" ... .
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> Here, the plaintiff provided no explanation for the almost four-year delay after the defendant defaulted in 2011 before it filed a request for judicial intervention in February 2015 requesting a residential mortgage foreclosure settlement conference. Under such circumstances, the Supreme Court should have found that the plaintiff had not demonstrated a reasonable excuse for its delay in seeking a default judgment ... . Since the plaintiff failed to proffer a reasonable excuse, this Court need not consider whether the plaintiff demonstrated a potentially meritorious action ... . Flushing Bank v Sabi, 2020 NY Slip Op 02461, Second Dept 4-29-20

A STIPULATION OF DISCONTINUANCE OF THE 2008 FORECLOSURE ACTION DID NOT MENTION DE-ACCELERATION OF THE DEBT OR THE ACCEPTANCE OF FUTURE INSTALLMENT PAYMENTS; THEREFORE THE DEBT WAS NOT DE-ACCELERATED AND THE SUBSEQUENT FORECLOSURE ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a stipulation of a discontinuance of the 2008 foreclosure action did not de-accelerate the debt. The foreclosure action was therefore time-barred:

> An action to foreclose a mortgage is subject to a six-year statute of limitations (see CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due ... . Once a mortgage debt is accelerated, however, the statute of limitations begins to run on the entire debt ... . "A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action" ... . * * *
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> Contrary to the plaintiff's contention, Bank of New York's execution of the stipulation of discontinuance of the 2008 action did not, by itself, constitute an affirmative act revoking acceleration ... . Notably, the stipulation was silent on the issue of acceleration and did not otherwise indicate that the plaintiff would accept installment payments ... . Moreover, a notice of de-acceleration must be "clear and unambiguous to be valid and enforceable" ... . Here, the notices of intent and 90-day notices which were sent prior to commencement of this action were completely silent as to de-acceleration. Bank of N.Y. Mellon v Yacoob, 2020 NY Slip Op 02451, Second Dept 4-29-20

THE APPEAL WAS RENDERED MOOT BY DEFENDANT'S TRANSFER OF THE PROPERTY AFTER SUPREME COURT RULED DEFENDANT HAD TITLE TO THE PROPERTY (THIRD

DEPT).

The Third Department dismissed the appeal as moot. Property which had been validly foreclosed by defendant was transferred to a third party. Plaintiff had brought an action pursuant to Real Property Actions and Proceedings Law (RPAPL) Article 15 to determine its rights to a portion of the foreclosed property. Supreme Court granted defendant's motion for summary judgment on its counterclaim for strict foreclosure (RPAPL 1352) and plaintiff appealed. The appeal was deemed moot and dismissed because defendant had a right to transfer the property after Supreme Court's ruling:

> [T]he jurisdiction of this Court extends only to live controversies and, as such, an appeal will be considered moot unless an adjudication of the merits will result in immediate and practical consequences to the parties" ... . "Since the ability to transfer clear title is a natural incident of [property] ownership, it follows that when a complaint involving title to or the right to possess and enjoy real property has been dismissed on the merits and there is no outstanding notice of pendency or stay, the property owner has a right to transfer or otherwise dispose of the property unrestricted by the dismissed claim" ... . "'[A] purchaser's actual knowledge of litigation and a pending appeal is not legally significant and[,] absent a validly recorded notice of pendency, an owner has the ability to transfer clear title'" ... .
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> Here, Supreme Court canceled plaintiff's notice of pendency and this Court denied his motion for a stay pending appeal. Therefore, defendants had the right to transfer the property when they did, and the purchaser obtained clear title despite its knowledge of the pending appeals. Govel v Trustco Bank, 2020 NY Slip Op 02306, Third Dept 4-16-20

MOTION TO VOLUNTARILY DISCONTINUE THE FORECLOSURE ACTION WAS PROPERLY GRANTED WITHOUT PREJUDICE (THIRD DEPT).

he Third Department determined plaintiff's motion to voluntarily discontinue the foreclosure action (CPLR 3217(b)) was properly granted without prejudice. The litigation was still in the early stages and, although defendant had interposed a counterclaim, defendant did not move for a default judgment within a year and thereby abandoned the counterclaim:

> Although this action had been pending for approximately three years at the time of the motion, the litigation itself remained in its early stages. In addition, the record confirms that defendant never sought default nor moved to compel discovery. Furthermore, the parties had not yet participated in the mandatory settlement conference (see CPLR 3408). Indeed, determination of plaintiff's motion was the first occasion where Supreme Court was called upon to intervene in this action. Although defendant alleged that she would sustain prejudice if her discovery went unanswered, Supreme Court correctly determined that there was no evidence of prejudice to defendant or other improper consequences flowing from the discontinuance, as the parties can engage in necessary discovery in a subsequent foreclosure action ... .
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> ... [T]he interposition of a counterclaim in and of itself is not dispositive with respect to the discontinuance. The discontinuance must work a particular prejudice against a defendant. Here, defendant is not prejudiced, as she will be able to assert her counterclaim in a subsequent foreclosure action. Although defendant argues that "one's home is an interest that is unquantifiable," she will be able to continue to reside in the mortgaged premises pending another action and will have the same rights available to her as were in the discontinued action ... . Green Tree Servicing LLC v Shiow Fei Ju, 2020 NY Slip Op 02307, Third Dept 4-16-20

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND DID NOT PRESENT NON-HEARSAY EVIDENCE OF STANDING IN THIS FORECLOSURE ACTION, CRITERIA EXPLAINED IN SOME DETAIL (SECOND DEPT).

The Second Department, in an extensive decision explaining the relevant issues and analysis in some depth, determined plaintiff bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 did not demonstrate standing to bring the foreclosure action:

> ... [T]he plaintiff failed to submit an affidavit of mailing or proof of mailing by the United States Postal Service evidencing that it properly mailed notice to the defendant pursuant to RPAPL 1304. Instead, the plaintiff relied on an affidavit of Rashad Blanchard, who was employed as a loan analyst by the parent company of the plaintiff's loan servicer, and copies of the purported notices. The plaintiff submitted only one letter that purported to constitute the statutorily required 90-day notice of default ... . Although the letter

contained the statement “sent via certified mail,” with a 20-digit number below it, no receipt or corresponding document issued by the United States Postal Service was submitted proving that the letter was actually sent by certified mail more than 90 days prior to commencement of the action. The plaintiff also failed to submit any documentary evidence that notice was sent by first-class mail. Further, Blanchard did not aver that the notice was sent in the manner required pursuant to RPAPL 1304, i.e., by certified mail and first-class mail. Moreover, since he did not aver that he personally mailed the notice, or that he was familiar with the mailing practices and procedures of American Home Mortgage Servicing, Inc., the entity that purportedly sent the notices, he did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed … . * * *

[Vice President] Reyes’s affidavit failed to establish a sufficient foundation for the admission of a business record pursuant to CPLR 4518(a) because, although he recited that the records upon which he relied were “regularly maintained by [the plaintiff] in the ordinary course of its business,” he “did not indicate that they were made by their author (or authors, whoever they might be) pursuant to an established procedure for the routine, habitual, systematic making of records that would qualify them as trustworthy accounts,” or that they “were the records regularly relied on in the business” … . Reyes also failed to indicate “that the record [was] made at or about the time of the event being recorded—essentially, that recollection [was] fairly accurate and the habit or routine of making the entries assured” … . …

… .[T]o the extent that Reyes’s purported knowledge of the date the plaintiff received the original note was based upon his review of unidentified business records maintained by the plaintiff, “[his] affidavit constituted inadmissible hearsay and lacked probative value” … . Deutsche Bank Natl. Trust Co. v Dennis, 2020 NY Slip Op 02039, Second Dept 3-25-20