

**THEODORE ROOSEVELT AMERICAN INN OF COURT**

**FEBRUARY 28, 2024 5:30 PM**

**NASSAU COUNTY BAR ASSOCIATION**

**CO-CHAIRS:**

Neil A. Miller, Esq.

Evelyn Kalenscher, Esq.

Program: Who Wants A Free House? Ramifications of the Foreclosure Abuse Prevention Act; Eviction of Occupants After Foreclosure

CLE: 2.0 credits Professional Practice

**Presenters:**

Neil A. Miller, Esq. - Miller, Rosado & Algios, LLP

Evelyn Kalenscher, Esq.

William P. Bodkin, Esq. – Chief Court Attorney, Nassau County Supreme Court

Zara G. Friedman, Esq. – Deputy Chief Appellate Court Attorney, Appellate Term, Second Department

Roberta D. Scoll, Esq. – Nassau Suffolk Law Services Committee

Law Student: Jack D. Prochner, 3<sup>rd</sup> Year St. Johns Law School Student

*Dinner will begin at 5:30pm and the program begins at 6:00pm*

**Neil A. Miller, Esq.**

NEIL A. MILLER, ESQ. is a 1981 graduate from University of Chicago Law School, and is currently a partner in the firm of Miller, Rosado & Algios, LLP, in Garden City. He was admitted to the practice of law in 1982, and has been in private practice since then, primarily in the area of commercial litigation, both at the trial and appellate levels, since that time. His firm has represented homeowners and their assignees in mortgage foreclosure litigation, and has been appointed by several different title insurance companies over the years to represent homeowners and lenders facing title claims, including those relating to mortgage foreclosures. He has chaired panels for Inns of Court on the following topics: Defending the Homeowner in the Aftermath of the Foreclosure Crisis; Sales of Real Property, Mergers and Related Party Transactions Entered into by Religious Corporations; Identity Theft in Real Property Transactions; and Dealing with *Pro Se* Litigants. He has been selected in various years as a New York Metro Area Super Lawyer in Commercial Litigation. He received his undergraduate degree from Franklin & Marshall College.

**Evelyn Kalenscher, Esq.**

Evelyn Kalenscher is a participant in the New York State Attorney Emeritus Program for retired attorneys who work pro-bono. Since 2009, Ms. Kalenscher has worked two days a week through the Nassau/Suffolk Law Services Volunteer Lawyers Project in the Landlord/Tenant Part of the Nassau County District Court, representing indigent clients who are at risk of being evicted from their homes. Prior to retiring, Ms. Kalenscher was a founding member and partner in the law firm of Genoa, Kalenscher & Noto, P.C., where she practiced Matrimonial and Real Estate Law.

Ms. Kalenscher has been recognized by numerous organizations for her pro-bono work. In 2012, she was honored as the Nassau County Bar Association's Pro Bono Attorney of the Year. In 2014, she received the New York State Bar Association's President's Pro Bono Service Award and the Pro Bono Award from the Legal Services Corporation. In 2018 she was named an Outstanding Woman in the Law by the Maurice A. Deane School of Law at Hofstra University for her pro-bono work, and she was presented with the Distinguished Volunteer Service Award by the Office for Justice Initiatives of the New York Unified Court System. Most recently, in October 2023, she was honored by the NYS Unified Court System Office for Justice Initiatives, the New York County Lawyers Association and the New York State Bar Association for outstanding contributions to pro bono and access to justice.

In addition to being a long time member of the Theodore Roosevelt American Inn of Court, she is a past president and a member of the board. Ms. Kalenscher also sits on the boards of the Nassau Lawyers Association and the Nassau County Women's Bar

Foundation where she is secretary and she is a member of the New York State Bar Association on the Real Property Committee. She is currently the president of the Board of Managers of her condominium community.

Ms. Kalenscher received a Bachelor of Business Administration Degree from Hofstra University and her JD degree from Hofstra University School of Law in 1989. She is admitted to practice in the State of New York, the District Court for the Eastern District of New York and the Supreme Court of the United States.

**William P. Bodkin, Esq.**

Bill Bodkin serves as the Chief Court Attorney and special referee at the Nassau County Supreme Court. In his spare time, he is the Village Justice for the Incorporated Village of Manorhaven when he is not lamenting the current state of the New York Mets. A close to 20 year veteran of the Court system, Bill has been privileged to be an Principal Appellate Court Attorney for the Appellate Division, First Department and a law clerk to two of Nassau's most respected judges, the Hon. Norman St. George and the Hon. Steven M. Jaeger.

A cum laude graduate of Brooklyn Law School, Bill has been a CLE lecturer for the Nassau County Court's Commission on Equal Justice

**Zara G. Friedman, Esq.**

Zara Friedman is the Deputy Chief Court Attorney for the Appellate Terms of the Supreme Court for the Second, Eleventh and Thirteenth Judicial Districts and the Ninth and Tenth Judicial Districts. Before joining the Law Department for the Appellate Terms, she was in private practice. She received her B.S. from Cornell University and her J.D. from The University of Maryland School of Law (now The University of Maryland Francis King Carey School of Law). She has done CLE and CJE updates on landlord/tenant law for The Judicial Institute and the Housing Court Judges Association Fall Conference.

**Roberta D. Scoll, Esq.**

Roberta D. Scoll, Esq. joined Nassau Suffolk Law Services Committee, Inc. as a staff Attorney and has served as coordinator of the Landlord/Tenant Attorney of the Day sector of the Volunteer Lawyers Project (VLP) for the past 15 years. The project represents low income clients about to be evicted from their housing. VLP enlists the aid of volunteer attorneys to represent the clients, as well as student interns, Pro Bono

Scholars, recent graduates of law school and newly admitted attorneys under the auspices of the Volunteer Lawyers Attorney of the Day project. In the Fall of 2023, the program was phased out as NSLS increased their in-house representation. Following the phase out, Ms. Scoll was a principal in initiating the Community Legal Help Project in Nassau County. This outreach program goes into Libraries as well as the Resource Center in the lower level of District Court in order to reach folks locally and advise them concerning their legal issues.

Since graduation from law school, Ms. Scoll has practiced matrimonial, personal injury, trademark and copyright law. For many years she had commuted to Washington, DC as a legal consultant to the film industry's trade association..

She received her Juris Doctorate in 1996, from City University of New York School of Law, with a keen focus and interest in public service and public interest law. In 1997 Ms. Scoll was admitted to practice in New York State, the United States District Court for the Southern and Eastern Districts of New York, and in 2002 she was admitted to the United States Supreme Court, the United States Court of Federal Claims, United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for the Armed Forces

From 2019 to 2022, Ms. Scoll was Chairperson of the Nassau County Bar Association's District Court Committee, and a member of the New York State Bar Association, American Bar Association, and the Theodore Roosevelt Inn of Court. In her current position at the Law Services, Ms. Scoll continues to work with volunteer attorneys counseling people on their rights and options on various Civil litigation topics. In November 2022, she was a recipient of the Leadership in Law Award from Long Island Business News.

### **Jack D. Prochner**

Jack Prochner is a third-year student at St. John's University School of Law. He previously worked as a summer associate at one firm specializing in commercial construction disputes and another in securities litigation. In 2021, Jack graduated from the University of Miami with a B.A. in Accounting and a minor in Finance. Jack has previously assisted the Inn in preparing both the *How to Navigate the New Gun Laws* program held on December 7<sup>th</sup>, 2022 and the *Negotiating a Record Contract* program held on May 23<sup>rd</sup>, 2023.

PROGRAM:

1. Introduction of Panel and Overview of Entire Program - Evelyn Kalenscher, Esq. - 5 minutes
2. General Statute of Limitations principles of Mortgage Foreclosure Actions, how law evolved, Freedom Mortgage v. Engel case, overview of FAPA; introduction of game show - Neil A. Miller, Esq. - 15 minutes.
3. Game Show Question 1 - illustration of FAPA Section 6 and the new CPLR 205-a concerning terminations of prior foreclosure actions for failure to take proceedings for a default judgment within one year of the default - 10 minutes.
4. Game Show Question 2 - illustration of FAPA Section 8 and the new CPLR 3217(e) concerning voluntary discontinuances - 10 minutes.
5. Game Show Question 3 - illustration of FAPA Section 4 and the new CPLR 203(h) concerning unilateral revocations of acceleration by lenders - 10 minutes.
6. Game Show Question 4 - illustration of FAPA Section 7 and the addition of subsections 3 and 4 to CPLR 213(4), concerning the ability of the plaintiff in a second foreclosure action to challenge the standing of the plaintiff in a prior foreclosure action to have accelerated the mortgage debt - 10 minutes
7. Game Show Question 5 - illustration of FAPA Section 2 and the addition of subsection 3 to RPAPL 1301, concerning the ability of a lender to commence a new foreclosure action while one was pending - 10 minutes
8. Questions & Answer Session re FAPA - 10 minutes
9. Landlord/Tenant considerations after sale of residential house after foreclosure - Evelyn Kalenscher, Esq. - 1 minute
10. Game Show Question 6 - eviction of former owner - 9 minutes
11. Game Show Question 7 - eviction of tenant of former owner - 10 minutes

I. STATUTE OF LIMITATIONS IN MORTGAGE FORECLOSURE ACTIONS:  
TRADITIONAL VIEW

A. Statute of Limitations is 6 years - CPLR 213(4); Everhome Mortgage Co. v. Aber, 39 N.Y.3d 949, 950, 178 N.Y.S.3d 8, 9 (2022).

B. When It Commences

1. Until the debt is accelerated, the mortgagee only has the right to sue on missed installment payments, and the 6 year statute of limitations runs from the date of each installment (Phoenix Acquisition Corp. v. Campcore, Inc., 81 N.Y.2d 138, 142, 596 N.Y.S.2d 752, 753 [1983]; Wells Fargo Bank, N.A. v. Burke, 94 A.D.3d 980, 982, 943 N.Y.S.2d 540, 542 [2<sup>nd</sup> Dept. 2012]).

2. Once the complaint is accelerated, the borrower's right and obligation to make monthly installment payments ceases, and the 6 year statute of limitations runs on the entire debt (EMC Mortgage Corp. v. Patella, 279 A.D.2d 604, 605, 720 N.Y.S.2d 161, 162 [2<sup>nd</sup> Dept. 2001]; Federal National Mortgage Corp. Association v. Mebane, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88, 90 [2<sup>nd</sup> Dept. 1994]).

3. The acceleration must be clear and unequivocal (Albertina Realty Co. v. Rosbro Realty Corp., 258 N.Y. 472, 476 [1932]; Nationstar Mortgage, LLC v. Weisblum, 143 N.Y.S.3d 866, 867, 39 N.Y.S.3d 491, 493 [2<sup>nd</sup> Dept. 2016]). The typical default letter states only that the mortgagee "may" choose to accelerate the loan if the default is not cured, and this is not deemed an acceleration because the note holder has the option, but is not obligated, to accelerate the loan if the default is not cured (see Adler v. Berkowitz, 254 N.Y.433, 436, *reh. den.*, 255 N.Y. 583 [1930]).

4. An unequivocal acceleration of the mortgage debt can occur by an appropriate allegation in the mortgage foreclosure complaint itself (Albertina Realty Co., supra; 1081 Stanley Ave., LLC v. Bank of New York Mellon Trust Co., N.A., 179 A.D.3d 984, 986, 118 N.Y.S.3d 643, 645 [2<sup>nd</sup> Dept. 2020]; Wells Fargo Bank, N.A. v. Burke, supra, 94 A.D.3d at 983, 943 N.Y.S.2d at 542-43 [2<sup>nd</sup> Dept. 2012]).

C. Revocation of Acceleration

1. Can be done unilaterally by mortgagee, but must occur must occur before the 6 year statute of limitations expires (US Bank National Association v. Livoti, 209 A.D.3d 1054, 1056, 176 N.Y.S.3d 713, 715-16 [2<sup>nd</sup> Dept. 2022]; Pennymac Corp. v. Smith, 199 A.D.3d 820, 822, 157 N.Y.S.3d 513, 515 [2<sup>nd</sup> Dept. 2021]).

2. The effect of a revocation of a prior acceleration of mortgage debt is to return the parties to their pre-acceleration rights and obligations, such that the noteholder might again accelerate the maturity of the then-outstanding debt and start a new foreclosure claim on that

outstanding debt (Freedom Mortgage Corp. v. Engel, 37 N.Y.3d 1, 28, 146 N.Y.S.3d 542, 553 [2021]).

3. A mere voluntary discontinuance of an action without an express mention of revocation of the acceleration seemingly would nevertheless be a revocation of an acceleration that occurred in the complaint, because such a discontinuance annuls everything done in the action (Brown v. Cleveland Trust Co., 233 N.Y.399, 406 [1922]; Loeb v. Willis, 100 N.Y. 231, 235 [1885]; Newman v. Newman, 245 A.D.2d 353, 354, 665 N.Y.S.2d 423, 424 [2<sup>nd</sup> Dept. 1997]).

## II. Developments in the Aftermath of the 2007-08 Financial Crisis

A. Explosion in the volume of foreclosure litigation, leading to unprecedented burdens on the Court system. There were abuses by plaintiffs in mortgage foreclosure actions and their counsel to cut corners, leading to enactment of various administrative requirements.

B. Long delays in processing even uncontested foreclosures due to difficulties in obtaining necessary paperwork, sometimes arising from constant assignments of mortgage notes and mortgages, changes in loan servicers and attorneys.

C. One consequence of the delays: Increased dismissal of uncontested foreclosure cases pursuant to CPLR 3215[c] for failure to “take proceedings” for a default judgment within one year of the default without demonstrating “sufficient cause” for the delay (*i.e.*, a reasonable excuse).

1. The Second Department became much more strict in interpreting the “reasonable excuse” requirement (see Giglio v. NTIMP, Inc., 86 A.D.3d 301, 926 N.Y.S.2d 546 [2<sup>nd</sup> Dept. 2011]; Wells Fargo Bank v. Cafasso, 158 A.D.3d 848, 72 N.Y.S.3d 526 [2<sup>nd</sup> Dept. 2018]; Private Capital Group v. Hosseinipour, 170 A.D.3d 909, 95 N.Y.S.3d 585 [2<sup>nd</sup> Dept. 2019]).

2. These dismissals often took place more than 6 years after the acceleration of the mortgage debt in the complaint. If so, CPLR 205(a) applied to allow a new action to be commenced within 6 months of the dismissal, as long as the defendant was also served in those 6 months as well. The new action could be commenced by an assignee of the original plaintiff. Wells Fargo v. Eitani, 148 A.D.3d 193, 47 N.Y.S.3d 80 [2<sup>nd</sup> Dept.], *app dsmsd*, 29 N.Y.3d 1023, 55 N.Y.S.3d 157 (2017).

3. It is questionable whether Eitani was correctly decided in light of the “neglect to prosecute” exception contained in CPLR 205(a), but Eitani was nevertheless followed by almost every appellate court to consider the question (see HSBC Bank v. Janvier, 187 AD3d 999, 133 NYS3d 596 [2<sup>nd</sup> 2020]; Estrella v. East Tremont Medical Center, 193 AD3d 567, 142 NYS3d 802 [1<sup>st</sup> Dept. 2022]; U.S. Bank Trust, N.A. v. Moomey-Stevens, 168 A.D.3d 1169, 91 N.Y.S.3d 788 [3<sup>rd</sup> Dept. 2019]).

D. The First and Second Departments determined that a voluntary discontinuance with no mention of revocation of the acceleration of mortgage does not in fact revoke an acceleration made in a foreclosure complaint (Wells Fargo Bank, N.A. v. Liburd, 176 A.D.3d 464, 107 N.Y.S.3d 858 [1<sup>st</sup> Dept. 2019]; Christiana Trust v. Barua, 184 A.D.3d 140, 125 N.Y.S.3d 420 [2<sup>nd</sup> Dept. 2020]; Ditech Financial LLC v. Naidu, 175 A.D.3d 1387, 109 N.Y.S.3d 196 [2<sup>nd</sup> Dept. 2019]).

III. The Seminal Case of Freedom Mortgage Corp. v Engel, 37 N.Y.3d 1, 146 N.Y.S.3d 542 [2021]. Decided issues of what constitutes an acceleration of the mortgage debt and what constitutes a revocation of an acceleration.

A. Acceleration must be accomplished by an unequivocal overt act, but that a default letter stating that the mortgagee “will” accelerate if the default is not cured was insufficient to constitute an acceleration.

B. A voluntary discontinuance does revoke an acceleration of a mortgage that was made in a mortgage complaint, even without an express mention of revocation. No inquiry needed into what the actual intent of the plaintiff was in discontinuing.

IV. The Foreclosure Abuse Prevention Act (“FAPA”).

A. Legislative Intent. One of the express purposes of the legislation is to correct “court decisions which, contrary to the intent of the legislature, have given mortgage lenders and loan servicers opportunities to . . . manipulate statutes of limitation to their advantage.” (New York State Senate Bill S5473A Sponsor Memorandum). “Some of these tactics have been sanctioned by the judiciary has resulted in perversion of longstanding law and created an unfair playing field that favors the mortgage banking and servicing industry at the expense of everyday New Yorkers.” (New York State Senate Bill S5473D Sponsor Memorandum).

B. Section 2 - amends Real Property Actions & Proceedings Law 1301(3). Now, a second mortgage foreclosure action cannot be commenced while an earlier one is pending, without leave of Court. The second action is deemed to have discontinued the first action.

1. Attempting to redress mortgagee abuses. For instance where there is some defect the plaintiff cannot remedy in the first action, and the second action is more than 6 years later, but the plaintiff moves to consolidate the two actions under the earlier index number to make the second action appear timely.

2. One decision has held that this “did not introduce a new concept to the RPAPL, but rather, expanded upon the existing statute”, so that a defendant in default in answering the complaint cannot assert this defense (Wells Fargo Bank, N.A. v. Brown, 2024 N.Y. Misc. LEXIS 412, 2024 Slip Op 30296 [Sup. Ct., Nass. Co. 1/23/24]).