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Discharge of Ancient Mortgages in New York

BY ADAM LEITMAN BAILEY

Title Insurance companies are under attack by governmental officials. Few other real estate businesses suffer the unjustified, frequent assaults by government officials like the title insurance profession. The difficulty in understanding their function and underestimating their necessity for the safe transfer of real estate requires real estate practitioner's to raise their pens to protect our transfer system. Since the mortgage crisis six years ago, the little-known and seldom-used doctrine of ancient mortgages has become important as a result of the decrease in the number of lending institutions still in business. The title industry, using this statute in part, has ensured that transfers would not stall during the worst real estate crisis.

Section 1931 of the Real Property Actions and Proceedings Law is an obscure statute that allows mortgagors and others with sufficient interest in a property to discharge "ancient mortgages," which would otherwise potentially cloud title. An "ancient" mortgage is one that, due to the lapse in time, is presumed satisfied. Despite no mention in the statute, it is well-settled New York common law that the required lapse in time for a mortgage to be considered "ancient" is 20 years past its due date.[1]

The statute is intended to aid in discharging mortgages which have been paid or are presumed paid, but for which documentation of payment does not exist.[2] Thus, the statute is not intended to relieve mortgagors from their obligation to repay the loan.

Significance of the Statute

Despite its narrow application,[3] the ancient mortgage doctrine has significant implications. During a property sale transaction, any outstanding mortgages are typically paid and recorded as satisfied. If these outstanding mortgages are not satisfied at closing, a buyer risks the newly purchased property being foreclosed by a pre-existing mortgagee.

Similarly, a title insurer may refuse to insure a property with an outstanding mortgage that cannot be recorded as satisfied or discharged. This may block a sale entirely because title insurance is often one of the lender's conditions for issuing the loan, and no attorney will advise a purchaser to make a purchase unless all previous mortgages are satisfied, or without title insurance. Therefore, this will cause a chilling effect

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on property sales because, even if the transaction proceeds, the amount due on the mortgage would likely be withheld from the seller and placed in escrow until the mortgage was satisfied or discharged.4

Requirements

An ancient mortgage petition requires verification, a description of the mortgage,5 a description of when and where the mortgage was recorded, an allegation that the mortgage has been paid, and information regarding any assignment of the mortgage.

The statute also requires that in order for an ancient mortgage to be discharged, the mortgagee or its assignees must be deceased (if a natural person) or no longer operating (if a corporation) for at least five years. If the mortgagee or its assignees are still living or operating, then the petitioner cannot successfully bring an ancient mortgage proceeding.6 Under the ancient mortgage statute, where the mortgagee is a corporation it need not have been formally dissolved but only must have "ceased to exist and do business" for the requisite five-year period.[7] The petition also must include information about the death or cessation of the mortgagee, such as whether letters of administration have been issued, times and places of death or last places of business, and information regarding heirs.

The statute reduces the petitioner's burden where the petition is brought 50 years after the mortgage is "recorded or adjudged to have been paid." Unlike the 20-year presumption of payment, this time period is set forth in the statute. Although the petitioner must still allege payment of the mortgage, if the petitioner is unable to determine the facts required to be stated in the petition "with reasonable diligence," it can do so to "the best knowledge and information of the petitioner," and detail the efforts undertaken to determine those facts. The court has discretion to proceed upon such a petition, notwithstanding the incomplete elements of the pleading.[8]

Once the above-referenced requirements have been collected and collated, and a petition has been made to the court requesting the discharge of the mortgage, the court shall make an order requiring all interested parties to show cause at a certain time and place why the mortgage should not be discharged of record. The names of all interested parties, as well as the date of the mortgage and where it was recorded, and the town or city in which the premises are situated must be included in the order. The order containing the above information shall thereafter be published in a newspaper of the court's choice, and the court may, at its discretion, order personal service as well.[9] Upon the court agreeing that that the matters alleged in the petition are true, it may make an order that the mortgage be discharged of record.

Courts are reticent to use the ancient mortgage doctrine unless it is clear that all required elements have been satisfied. For example, in Verderame v. Vanleit,[10] a mortgagor attempted to discharge a mortgage pursuant to §1931, but the court held that he failed to meet all of the statutory requirements and thus denied his petition.

The petitioner granted a $6,700 mortgage on his home to the respondents when he purchased it in 1970.When the petitioner sold his home in 2011, a title search revealed the mortgage as unsatisfied. Thereafter, $6,700 of the purchase price was held in escrow until the mortgage was discharged, presumably in order to satisfy the mortgage in the event the mortgage could not be discharged.

The court held that this was not an ancient mortgage because no due date for any payments could be determined, and therefore it was impossible to know when 20 years since the due date had passed. Because the 50-year threshold to reduce a petitioner's burden had not been met, and the 20-year time period could not be determined, the mortgage could not be discharged under the ancient mortgage statute.

Clarifying "Due Date"

Case law provides that an ancient mortgage is one that has not been "discharged of record within 20 years after the debt was due…."[11] No case explicitly states the definition of the "due date" however, thus creating a potential issue due to this lack of clarity.

From this construction it is also unclear when the 20-year clock begins to run. Modern mortgages are very different from those granted when this common law rule was established. Today, most mortgages have a high number of "due dates." A 30-year mortgage with monthly payments will have 360 "due dates," where, for example, in one 1856 case a loan was to be paid in six annual installments.[12] This raises the question of whether the presumption of payment is 20 years from the cessation of payment, or from the mortgage's date of maturity.

Courts deem a mortgage "ancient" 20 years from either the final due date, or the due date at which a mortgagee has abandoned the loan, whichever is earlier. Although courts have never used this term, the loan is abandoned when neither the mortgagor makes payments nor the mortgagee requests them. Despite the fact that missing a due date is contrary to the required allegation that the mortgage has been paid, the ancient mortgage statute allows the court to discharge a mortgage that has been abandoned, as long as the 20-year time period has passed.

For example, in Application of Addesso, the petitioner alleged that from 1936 until the date of the petition, in 1947 (a period of 10-and-a-half years), no payments on the mortgage had either been made or requested. The court found that there was no presumption of payment arising from a nonpayment period of 10-and-a-half years. This indicates that the court calculated the 20-year requirement from the first due date at which no payment was made or requested, and not the date of maturity of the loan, which had yet to occur.[13]

When the Clock Begins to Run

The 20-year requirement for a mortgage to be considered "ancient" is entirely a common law construct, although modern courts continue to utilize it. For example, the court in Verderame cited the 20-year period as a common law doctrine which had been codified in Real Property Law §340, the first version of the ancient mortgage statute.[14] However, that claim was incorrect—neither RPL §340, nor RPAPL §1931, which replaced it and remains current, actually established a requisite time period for an ancient mortgage.

This demonstrates that modern courts are relying on a false understanding of the law's derivation, and that the 20-year period may be less fixed than some cases would suggest. Although there are no documented challenges to the common law time period, a practitioner may choose to raise the issue in the future.

Inability to Locate Mortgagee

Because RPAPL §1931 governs "ancient" mortgages which are, by definition, decades old, the situation may arise in which a mortgagor is unable to determine the current status of a mortgagee or its assignee. For example, in Application of Goldberg, the petitioner brought a proceeding under the previous version of the law (RPL §340) to discharge an ancient mortgage.[15] The court held that the petitioner could not proceed under the ancient mortgage statute, as the petitioner was unable to locate the mortgagee and did not even know whether the mortgagee was alive or dead.[16]

Allegation of Payment

RPAPL §1931(2) requires that the petition to discharge the mortgage in question "allege that such mortgage is paid…." A common issue that arises in ancient mortgage cases is the standard for a sufficient allegation of payment. Furthermore, once a mortgage is deemed "ancient" there is a presumption of payment, but the statute does not explicitly address whether the petitioner must provide any additional evidence proving satisfaction of the mortgage.

In Matter of Michel, the court found that although a mortgage was presumed paid based on the 20-year presumption, because the petitioner, the mortgagor, admitted that she had not paid any principal or interest on the mortgage in more than 20 years, she failed to fulfill the requirements of the statute.

A mortgagor attempting to utilize the ancient mortgage statute cannot plead that the mortgage is unpaid; if the mortgagor does, the court will not order it discharged. Although the court in Michel held that the petitioner could not proceed under the ancient mortgage statute, this was because she rebutted the presumption of payment by stating that she, as the mortgagor, had not made any payments on the mortgage in over 20 years, and additionally that the mortgagee was still alive. The court did not hold that the petitioner was required to provide any additional evidence beyond the presumption of payment.[17]

Therefore, once a mortgage is deemed "ancient," a petitioner simply must allege the mortgage is paid, and unless evidence to the contrary is presented, the statute's requirement has been satisfied. The statute relies on a mortgagor-petitioner's good faith allegation; the presumption of payment could potentially allow a petitioner to falsely allege payment where no evidence to the contrary exists.

Interest to Bring Claim

Only the mortgagor, his heirs, or any person having any interest in the property at issue may bring a petition under RPAPL §1931.[18] This can create an issue when a mortgagor sells a mortgaged property, thereby transferring his interest, and later attempts to have the mortgage discharged under §1931.

In Guccione v. Estate of Guccione the petitioner purchased a home with her husband and executed a mortgage in favor of the husband's parents. After the parents' death and the petitioner's divorce from her husband, she brought an action to, inter alia, have the mortgage discharged pursuant to the ancient mortgage statute. However, the petitioner had already sold the property to a third party before submitting the petition, and a portion of the sale price was put into escrow due to the outstanding mortgage.

The court held that the petitioner ceased to have an interest in the property when she conveyed it, and that her only remaining interest was in the funds held in escrow. However, because she was the mortgagor, she could file a petition under §1931, as is explicitly allowed by the statute. Despite being able to submit the petition, the petitioner's summary judgment motion was found to have been properly denied, as the mortgage was not shown to be "ancient" for reasons not articulated by the court.[19]

Although not directly ad-dressed by Guccione, this holding creates the implication that if the petitioner was not the mortgagor, she would not have had recourse under the ancient mortgage statute to have the mortgage discharged and to recover the funds in escrow, as her status as grantor was insufficient to confer standing.

Alternate Methods

As evidenced by the requirements discussed above, an ancient mortgage proceeding is not always an appropriate method for a mortgagor to attempt to discharge a mortgage; it is only available in a relatively narrow set of circumstances. However, there are a number of other statutes which may be alternatives to a proceeding under §1931.

Paid Residential Mortgages

When a mortgage has been paid in full, and the only obstacle to its discharge is that an uncooperative lender has failed to issue a timely satisfaction of mortgage document, a cause of action is available under RPAPL §1921(5). This only applies to mortgagors of one-to-six family, owner-occupied residential structures or residential condominium units. If the mortgagee does not file a timely objection in such a proceeding, an affidavit of the mortgagor's attorney can be recorded as satisfaction of the mortgage. This cause of action requires proof that the mortgage was fully paid.[20] Other subsections of §1921 discuss the requirement that a mortgagee deliver a satisfaction of mortgage to the mortgagor, and provide statutory penalties for failure to do so.

Statute of Limitations

Finally, where the six-year statute of limitations[21] on a foreclosure action has expired, a mortgagor may move, pursuant to RPAPL §1501, to "secure the cancellation and discharge of record of such encumbrance."[22] The statute of limitations begins to run when a mortgagee has a cause of action to foreclose on an installment of the loan, or on the entire loan if the mortgagee has accelerated it. This type of action is distinguished from the other statutes discussed above because it does not require that the mortgagor have paid off the underlying loan. However, there are exceptions and additional nuances to the statute of limitations on a mortgage beyond the scope of this article.

Conclusion

The goal of New York's ancient mortgage statute, to protect title from being "unmarketable" due to long-standing mortgages of record, is effected similarly by statutes in other states. For example, approximately 20 states currently have passed legislation, often called a "Marketable Record Title Act," that protects title from particular encumbrances of record which are more than a certain age. While New York's law only addresses mortgages, and is effected in a different

manner, both types of statutes aim to protect an otherwise unmarketable title. Thus, the ancient mortgage statute is an underutilized but necessary method for clearing title and promoting the alienability of real property.

ENDNOTES:

1. Application of Addesso, 69 N.Y.S.2d 702, 706 (Sup. Ct. 1947); Verderame v. Vanleit, 32 Misc. 3d 1221(A), 934 N.Y.S.2d 37 (Civ. Ct. 2011).

2. Matter of Michel, 206 Misc. 356, 134 N.Y.S.2d 124 (Sup. Ct. 1954) (stating that RPL §340, the precursor to RPAPL §1931, "was designed to afford summary relief from the encumbrance of an ancient mortgage where on account of the death of mortgagees or their assignees, satisfaction of the mortgage could not be obtained without recourse to a plenary action.").

3. Westlaw only has six cases and three trial court orders listed as citing the current version of the statute, RPAPL §1931, enacted in 1962.

4. See, e.g., Risicato v. Lumberyard Supply, 194 Misc. 2d 770, 755 N.Y.S.2d 583 (Civ. Ct. 2003).

5. The mortgagor may be a natural person or a corporation. For an example of a corporate mortgagor, see In re O&O Properties, 2008 WL 9890135 (Sup. Ct. June 12, 2008).

6. RPAPL §1931(2). See also Green Seal Realty v. Strack, 135 N.Y.S.2d 46 (Sup. Ct. 1954).

7. RPAPL §1931(2); In re Bryan, 210 A.D. 93, 205 N.Y.S. 564 (1st Dept. 1924).

8. RPAPL §1931(2).

9. RPAPL §1931(4); Matter of Grasso, 168 A.D.2d 713, 563 N.Y.S.2d 569 (3d Dept. 1990) (holding that "[w]hile personal service is also available, it is not required….").

10. Verderame, 32 Misc. 3d 1221(A), 934 N.Y.S.2d 37.

11. Application of Zimmerman, 21 Misc.2d 1048, 198 N.Y.S.2d 373 (Sup. Ct. 1960).

12. Morey v. Farmers' Loan & Trust, 14 N.Y. 302 (1856).

13. Addesso, 69 N.Y.S.2d at 704.

14. Verderame, 32 Misc.3d 1221(A), 934 N.Y.S.2d 37.

15. The two versions of the statute are nearly identical. A number of statutes, including §340, were reorganized under the Real Property Actions and Proceedings Law, despite little or no change in substance.

16. Application of Goldberg, 16 Misc. 2d 242, 183 N.Y.S.2d 270 (Sup. Ct. 1959).

17. Michel, 206 Misc. 356, 134 N.Y.S.2d 124.

18. RPAPL §1931(1).

19. Guccione v. Estate of Guccione, 84 A.D.3d 867, 923 N.Y.S.2d 591 (2d Dept. 2011).

20. RPAPL §1921(5).

21. CPLR §213(4).

22. RPAPL §1501(4).

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