New York Appellate Court Reaffirms Avenue For Lenders To Revive Dismissed Cases Following Expiration of Statute of Limitations

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As we get further away from the financial crisis of 2008, the statute of limitations has become a much more asserted and examined defense in mortgage foreclosure actions.

Last week, New York’s Appellate Division, Second Department, applied what it recognized as the “core purpose” of the CPLR’s savings provision – CPLR 205(a) – to allow the assignee of a mortgage loan "a genuine bite at the apple" to re-start a mortgage foreclosure action following the expiration of the original statute of limitations.

In a decision which included a strenuous dissent, the majority in Wells Fargo Bank, N.A. v Eitani, 2017 NY Slip Op 01015 (2d Dep’t Feb. 8, 2017), affirmed the trial court’s holding that Wells Fargo Bank, N.A., as trustee for a mortgage-backed securities trust ("Wells Fargo") that was assigned the subject mortgage loan from a separate party during the pendency of a prior foreclosure action, could utilize CPLR 205(a)’s six-month savings provision to start a new action after the prior action was dismissed and the statute of limitations expired. Considering the statute of limitations issues many mortgage loan holders and servicers face, this decision may provide a bit of breathing room to revive a recently-dismissed case.

The facts of this case are all too familiar for foreclosure actions in the loan securitization era. The original borrower, Doran Eitani, took out a loan and executed a mortgage with Argent Mortgage Company, LLC ("Argent") in May of 2005. Eitani defaulted on the loan just three months after closing. In November of 2005, Argent accelerated the loan and began a foreclosure action (the “Prior Action”). Eitani did not respond to the foreclosure complaint, and in June 2008 Argent obtained an order of reference based on this default. In January of 2008, prior to the issuance of the order of reference, Argent assigned and delivered the note and mortgage to Wells Fargo, and in March of 2011 Eitani conveyed the subject property to David Cohan. Neither Argent nor Wells Fargo moved for a judgment of foreclosure after obtaining the order of reference, and Wells Fargo was never officially substituted into the Prior Action as plaintiff.

In August of 2013, after nearly five years of inactivity, the Prior Action was administratively dismissed “as abandoned pursuant to CPLR 3215(c), without costs or prejudice.” Less than four months later, in November of 2013, Wells Fargo – as the holder and owner of the note and mortgage – initiated a new action (the “Current Action”), relying on the six-month savings provision in CPLR 205(a). Cohan responded by making a motion to dismiss that argued the savings provision was not available because i) the Prior Action was dismissed for a failure to prosecute; and ii) Wells Fargo was not a plaintiff in that action. The trial court denied Cohan’s motion, holding that the savings provision was applicable and the Current Action was timely commenced. In a 3-2 decision, the Second Department affirmed the trial court’s decision.

CPLR 205(a) – entitled “New action by plaintiff” – allows a plaintiff to bring a new action on the same “transaction or occurrence,” regardless of the statute of limitations, so long as the prior action was not terminated because of “voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal…for neglect to prosecute the action, or a final judgment on the merits,” the new action is started within six months of the end of the prior action, and the
prior action was timely when it was commenced. On appeal, Cohan argued that CPLR 205(a) did not apply because the Prior Action’s dismissal constituted a dismissal for a “neglect to prosecute” and that the plaintiff in the Current Action was different from the Prior Action.

On Cohan’s first argument, the majority and dissent were in agreement: the trial court’s dismissal of the Prior Action “as abandoned pursuant to CPLR 3215(c)” was not a dismissal for “neglect to prosecute.” CPLR 205(a) specifically delineates a “neglect to prosecute” dismissal as one under CPLR 3216, and since the Prior Action was dismissed under CPLR 3215, Cohan’s argument could not succeed.

On the second argument the majority and dissent were directly at odds. The majority reasoned that, because Wells Fargo and Argent brought actions seeking to enforce “the very same right – i.e., to foreclose on the subject property,” and because CPLR 1018 provides a statutory right for Wells Fargo to continue the action in Argent’s place without a formal substitution, allowing Wells Fargo to take advantage of the six-month savings provision was proper “in keeping with the remedial purpose of CPLR 205(a) and the legislative intent underlying enactment of the statute.”

To reach this conclusion, the majority had to distinguish the Court of Appeals’ decision in Reliance Ins. Co. v. PolyVision Corp., 9 N.Y.3d 52 (2007). In Reliance, the Court held that a related, yet separate, corporate entity could not take advantage of CPLR 205(a) when filing a new action, because the separate entity could potentially seek to assert separate rights or pursue different interests from the original plaintiff. However, focusing on the fact that Wells Fargo was “not seeking to assert any rights separate and independent from those asserted by Argent” in the prior action, the majority concluded that “the instant case is distinguishable from Reliance and represents what may be a rare circumstance in which dismissal of a prior action commenced by a different party plaintiff justifies application of CPLR 205(a) to recommencement by a successor in interest to the prior plaintiff.”

The dissent focused instead on the Court of Appeals’ language which stated “we have not read ‘the plaintiff’ [as used in CPLR 205(a)] to include an individual or entity other than the original plaintiff.” Because Argent and Wells Fargo are separate entities – albeit with similar interests – the dissent stated “Wells Fargo seeks not to vindicate Argent’s rights but to vindicate Wells Fargo’s rights.” Put another way, the dissent viewed Wells Fargo’s actions as an attempt to impermissibly toll the statute of limitations through CPLR 205(a), an action which it could not condone. “This Court is constrained to interpret CPLR 205(a) in accordance with how it was written by the Legislature and how it has been interpreted by the Court of Appeals.”

The Second Department’s two-judge dissent entitles Cohan to take an appeal to the Court of Appeals as of right, so it would not be surprising if Cohan exercised this option. But for now, attorneys representing the holders or servicers of mortgage loans transferred to a separate entry during the pendency of a prior litigation should take note of this decision as an avenue for reviving an action after the expiration of the original statute of limitations.

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