



FEBRUARY 2017 ■ NO. 2

Consumer Finance Litigation

NY Appellate Court Holds CPLR 205(a) Applies to Note Owner's Successor in Interest If Prior Action Not Dismissed for Failure to Prosecute

Action Item: New York's Appellate Division, Second Department, affirms that dismissal under Civil Practice Law and Rules ("CPLR") 3215(c) does not constitute neglect to prosecute and therefore a plaintiff may avail itself of the savings provision of CPLR 205(a) to recommence an action. Importantly, in some instances, CPLR 205(a) is applicable to a party's successor in interest. Servicers and lenders should take note of this decision as a defense against a potential statute of limitations challenge in foreclosure actions.

In Wells Fargo Bank, N.A., as Trustee, in Trust for the Registered Holders of Park Place Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2005-WCW1 v. Doron Eitani, Index No. 2014-9426 (2d Dept. Feb. 8, 2017), the New York Appellate Division, Second Department, determined the novel issue of whether a plaintiff, such as the Trust (as defined herein), who is a successor in interest as the holder and owner of the note and mortgage, is entitled to take advantage of the savings provision of CPLR 205(a). The Second Department decided in the affirmative by affirming the denial of defendant David Cohan's ("Cohan") motion pursuant to CPLR 3211(a)(5) to dismiss the foreclosure action on the grounds that it was time-barred.

The Prior Foreclosure Action

On or about November 16, 2005, Argent Mortgage Company, LLC ("Argent") commenced an action in the Supreme Court, Kings County, against borrower-defendant Doron Eitani ("Eitani") to foreclose a mortgage encumbering property located in Brooklyn, New York (the "Prior Action"). During the pendency of the Prior Action, Argent transferred and assigned the note and mortgage to Wells Fargo Bank, N.A., as Trustee, in Trust for the Registered Holders of Park Place Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2005-WCW1 (the "Trust"). On August 1, 2013, the Administrative Judge for Civil Matters in the Supreme Court, Kings County issued an order directing the dismissal of the Prior Action "as abandoned pursuant to CPLR 3215(c), without costs or prejudice" (the "Order of Dismissal").

The Instant Action

On November 25, 2013, less than four months after the Prior Action was dismissed, the Trust commenced a foreclosure action pursuant to CPLR 205(a). Cohan, the record owner of the subject property, moved to dismiss the action. In support of his motion, Cohan argued that the action was barred by New York's six-year statute of limitations because it was commenced more than eight years after the mortgage was accelerated in

2005. The lower court denied Cohan’s motion on the grounds that CPLR 205(a) was applicable and thus, the action was timely commenced. Cohan appealed.

The Appellate Court’s Decision

The Second Department affirmed the lower court’s decision denying Cohan’s motion to dismiss. In arriving at its decision, the Second Department found that Cohan demonstrated that (i) the statute of limitations began to run when Argent (the Trust’s predecessor in interest) accelerated the mortgage debt owed by Eitani in October or November 2005; and (ii) the instant action was commenced more than six years later. The Second Department also held, however, that the Trust’s action was timely under the savings provision of CPLR 205(a).

CPLR 205(a) provides, in pertinent part, that:

“[i]f an action is timely commenced and is terminated in any other manner than by voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.”

The Prior Action was dismissed “without costs or prejudice” on the basis that it was “abandoned pursuant to CPLR 3215(c),” which provides that the Court may dismiss an action based on plaintiff’s failure to move for default judgment within a year after the default. The Second Department reasoned that because the Order of Dismissal of the Prior Action did not include any finding of specific conduct demonstrating “a general pattern of delay in proceeding with the litigation,” the Order of Dismissal was not based on neglect to prosecute. See CPLR 205(a).¹ Furthermore, because the Prior Action was dismissed “without costs or prejudice,” the lower court permitted plaintiff to avail itself of CPLR 205(a).² Therefore, the requirements of CPLR 205(a) were met, and the lower court correctly denied Cohan’s motion to dismiss.

More importantly, the Second Department addressed whether a successor in interest of the holder of the note and mortgage, such as the Trust, that seeks to recommence a foreclosure action originally commenced by a prior holder of the same instruments, may benefit from the six-month grace period or “savings provision.” The Second Department held that it can. Because the Trust had a statutory right to continue the Prior Action in Argent’s place after the mortgage and note were assigned, the Trust was a true party plaintiff in the Prior Action and therefore, entitled to the benefit of CPLR 205(a).

The *Eitani* decision is significant in several respects. First, in recent years, New York State Courts have dismissed older cases in order to clear the docket and lighten a judge’s caseload, many of which are dismissed pursuant to CPLR 3215(c). A party may not avail itself of the savings provision of CPLR 205(a) if the action is dismissed for, among other things, failure to prosecute. The *Eitani* decision holds that dismissal under CPLR 3215(c) does not constitute a dismissal for neglect to prosecute, and therefore, a party may recommence an action under CPLR 205(a) within the six-month grace period, despite the expiration of the statute of limitations. In addition, this decision establishes clear precedent that parties that share the same interest or “claim” (i.e., to enforce rights under the note and mortgage) may be afforded the protection of the savings provision even if they are not the originally named plaintiff.

Mr. Streibich would like to thank Diana M. Eng and Andrea M. Roberts for their assistance in developing this Alert.

1. See *Marrero v. Crstal Nails*, 114 A.D.3d 101, 111 (2d Dept. 2013).

2. See *Bread & Butter, LLC v. Certain Underwriters at Lloyd’s London*, 78 A.D.2d 1099, 1101 (2d Dept. 2010).

For more information, please contact:

Wayne Streibich
215.569.5776 | WStreibich@BlankRome.com

Diana M. Eng
212.885.5572 | DEng@BlankRome.com

Andrea M. Roberts
212.885.5568 | ARoberts@BlankRome.com