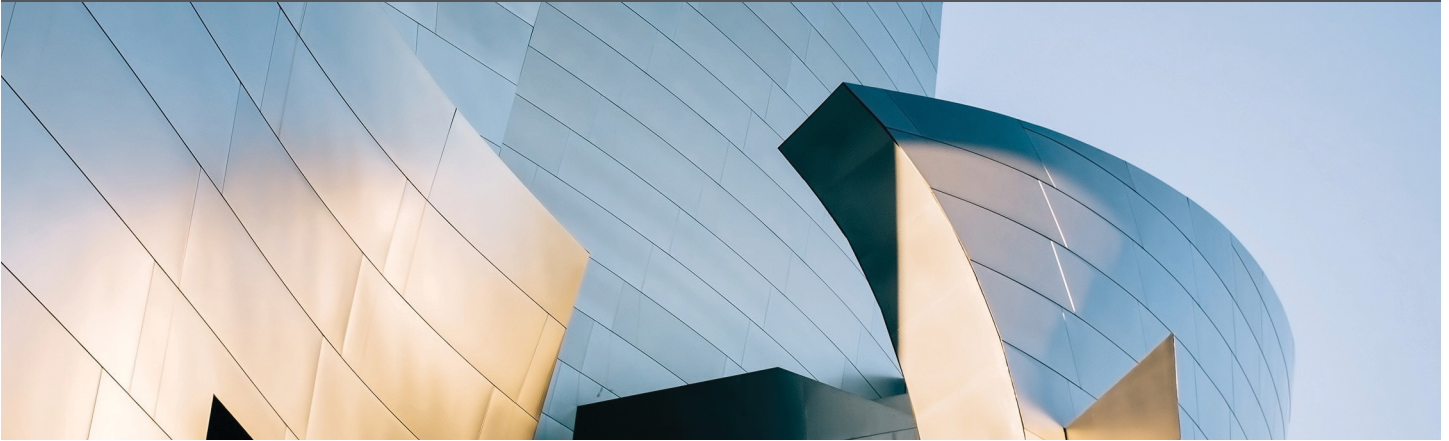


Consumer Finance Litigation



SEPTEMBER 2018 • NO. 7

New York Appellate Court Holds Short Sale Documents Do Not Constitute an Acknowledgment of the Debt to Restart the Statute of Limitations

New York's Appellate Division, Second Department, ruled short sale documents do not constitute an unqualified acknowledgment of the debt or manifest a promise to repay the debt sufficient to reset the statute of limitations under New York General Obligations Law § 17-101. Financial institutions and servicers should consider these decisions when assessing what arguments they have to rebut a statute of limitations defense.

On August 29, 2018, New York's Appellate Division, Second Department ("Second Department"), issued two decisions holding that documents submitted by a borrower in connection with an attempted short sale of the property did not constitute an acknowledgment of debt under New York General Obligations Law § 17-101 ("GOL § 17-101"). In *Karpa Realty Group, LLC v. Deutsche Bank Nat'l Trust Co.*, 2018 WL 4101011 (2d Dept. Aug. 29, 2018), the Second Department affirmed the Kings County Court's decision granting plaintiff Karpa Realty Group, LLC's ("Karpa Realty") motion for summary judgment and denying defendant Deutsche Bank National Trust Company's ("Deutsche Bank") cross-motion for summary judgment to dismiss Karpa Realty's quiet title complaint. Deutsche Bank argued that the statute of limitations to foreclose had not expired because the borrower submitted a written hardship letter in connection with his short sale application, acknowledging the debt under GOL § 17-101, thus renewing the statute of limitations. The Second Department held the letter "did not constitute an unqualified acknowledgment of the debt or

manifest a promise to repay the debt sufficient to reset the running of the statute of limitations." *Id.* at *2.

Similarly, in *Yadegar v. Deutsche Bank Nat'l Trust Co.*, 2018 WL 4100824 (2d Dept. Aug. 29, 2018), the Second Department affirmed the Nassau County Court's decision granting plaintiff Sharona Yadegar's ("Yadegar") motion for summary judgment and denying defendant Deutsche Bank's cross-motion for summary judgment to dismiss the borrower's quiet title complaint. As in *Karpa Realty*, Deutsche Bank argued that borrower's short sale application constituted an acknowledgment of debt under GOL § 17-101. Consistent with *Karpa Realty*, the Second Department held that these short sale documents "did not constitute an unqualified acknowledgment of the debt sufficient to reset the statute of limitations." *Id.* at *2. Further, the Second Department held that the letter from borrower "while arguably acknowledging the existence of the mortgage, disclaimed any intent to pay it with the [borrower's] own funds." *Id.*

SUMMARY OF FACTS AND BACKGROUND

In *Karpa Realty*, Deutsche Bank had previously commenced a foreclosure action against the borrower, Alister Aird, in August 2008, thereby accelerating the debt. The 2008 foreclosure action was subsequently dismissed in December 2013 pursuant to CPLR 3216 for failure to prosecute. Borrower subsequently deeded the property to Karpa Realty, and Karpa Realty, as the new property owner, commenced a quiet title action under RPAPL § 1501(4) against Deutsche Bank alleging that the statute of limitations to foreclose had expired. Karpa Realty moved for summary judgment and defendant, Deutsche Bank, cross-moved for summary judgment to dismiss the complaint. The Kings County Court granted Karpa Realty's motion and denied Deutsche Bank's cross-motion. Deutsche Bank appealed.

In *Yadegar*, Deutsche Bank had previously commenced a foreclosure action in March 2008 (the "2008 Foreclosure") and again in April 2009 (the "2009 Foreclosure"). The 2008 Foreclosure was discontinued in January 2012 and the 2009 Foreclosure was dismissed as abandoned in September 2012. Yadegar thereafter commenced a quiet title action seeking to cancel and discharge the mortgage on the grounds that the statute of limitations to foreclose had expired. Yadegar moved for summary judgment and defendant, Deutsche Bank, cross-moved for summary judgment to dismiss the complaint. The Nassau County Court granted Yadegar's motion and denied Deutsche Bank's cross-motion. Deutsche Bank appealed.

THE SECOND DEPARTMENT'S DECISIONS

Under GOL § 17-101, a debtor's signed writing acknowledging the debt and demonstrating an intent to pay that debt revives a time-barred claim. *See Sichol v. Crocker*, 177 A.D.2d 842, 576 N.Y.S.2d 457 (3d Dept. 1991); *U.S. Bank Nat'l Ass'n v. Martin*, 144 A.D.3d 91, 41 N.Y.S.3d 500 (2d Dept. 2016) (holding that to revive a debt, the writing "must be signed and recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it").

In both *Karpa Realty* and *Yadegar*, Deutsche Bank argued that the short sale documents submitted by the respective borrowers constituted an acknowledgment of the debt under GOL § 17-101, thereby restarting the expired statute of limitations. The Second Department disagreed.

While the Second Department recognized that the letters from the borrowers acknowledged the existence of their respective mortgages, the writings did not rise to the level of an "unqualified acknowledgement" or "intention on the part of the debtor to pay [an existing debt]" such that the writings constitute an acknowledgment under GOL § 17-101. In addition, in *Yadegar*, the Second Department ruled that the fact that borrower did not intend to pay the debt with her "own" funds further confirmed that the letter submitted with the short sale documents did not constitute an acknowledgment of debt and intent to pay it. Because the short sale documents were insufficient to acknowledge the debt under GOL § 17-101, the Second Department held that Deutsche Bank failed to raise a triable issue of fact in both *Karpa Realty* and *Yadegar*. As such, the Second Department affirmed both lower court decisions.

CONCLUSION

Karpa Realty and *Yadegar* are significant because the Second Department has further limited the lender's ability to revive time-barred debts. In resolving a split among the lower courts in the Second Department, the lender's inability to rely on short sale documents presents a further hurdle to defeating the statute of limitations defense.

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

For more information, please contact:

Wayne Streibich
215.569.5776 | wstreibich@blankrome.com

Diana M. Eng
212.885.5572 | deng@blankrome.com

Jonathan M. Robbin
212.885.5196 | jrobbin@blankrome.com

Andrea M. Roberts
212.885.5568 | aroberts@blankrome.com