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Locke Lord QuickStudy: New York Appellate Court allows Action on Note Debt Despite Finding that Statute of Limitations Precludes Foreclosure Action

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While it is common knowledge in New York that the statute of limitations to collect a debt is six years from the time of acceleration, in a recent decision the Appellate Division, Third Judicial Department opened up the possibility that a lender can still bring a claim against a borrower on the promissory note even though the statute of limitations expired on a mortgage foreclosure action. By analyzing the interplay of New York's law on the election of remedies and the toll on the statute of limitations during a period of "statutory prohibition" in *CitiMortgage Inc. v. Ramirez*, — N.Y.S.3d –, 2020 NY Slip Op. 07970, 2020 WL 7647749 (Third Dep't Dec. 24, 2020) the Appellate Division reversed the trial court and permitted a subsequent lawsuit against the borrower for a money judgment for his breach of the terms of the promissory note because the statute of limitations was tolled during the pendency of the mortgage foreclosure action.

On May 5, 2010, CitiMortgage, Inc. ("Citi") commenced a foreclosure action against borrower Jose Ramirez ("Ramirez"). On October 30, 2013, the trial court dismissed that action for Citi's failure to prosecute. In 2017, Citi commenced a second foreclosure action however the trial court dismissed this subsequent mortgage foreclosure action because it found that the statute of limitations had expired in May 2016 – outside New York's six-year statute of limitations period to collect an accelerated debt obligation.

In May 2019, Citi commenced an action against Ramirez seeking a money judgment for the unpaid balance of the promissory note. Soon thereafter, Ramirez filed a pre-answer motion to dismiss arguing that the trial court already found that the statute of limitations expired on Citi's ability to collect the debt such that any subsequent action in contract is barred by the applicable six-year statute of limitations and collateral estoppel. In response, Citi argued that RPAPL § 1301(3) prohibited the filing of a subsequent action while the former one is pending and further argued that commencement of an action to pursue a judgment on the promissory note was similarly stayed during the pendency of the first action by CPLR § 204(a). In essence, Citi's position was the statute of limitations to commence an action in contract to pursue a remedy under the note was tolled during the entire pendency of the foreclosure actions – a distinct action from that of one for a money judgment under the promissory note that could not have been pending simultaneously with a mortgage foreclosure action.

Agreeing with Ramirez, the trial court found that Citi could not "use this statutory prohibition to argue that at the same exact time as the six (6)–year statute of limitations begins to run upon the commencement of a foreclosure action, the limitations period is simultaneously tolled until that action is dismissed, and then starts to run again for another six (6) years from the date of dismissal of the earlier action."

In reversing the trial court's decision, the Appellate Division, examined the interplay of RPAPL § 1301(3) and CPLR 204(a) and their effect on a mortgage foreclosure action and a suit on the promissory note. As noted above, CPLR 204(a) provides that, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." The Appellate Division also noted that "this rule has strong roots in the equitable principle that plaintiffs should not be penalized for failing to assert their rights when a court or statute prevents them from doing so. [A] toll operates to compensate a claimant for the shortening of the statutory period in which it must commence – or recommence – an action, irrespective of whether the stay has actually deprived the claimant of any opportunity to do so." *Ramirez*, 2020 WL 7647749 at *3 (citations omitted).

The Appellate Division also examined the more narrow statute of RPAPL § 1301(3), which provides that, while an action for a mortgage debt "is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." Here, the Appellate Division found that "[t]he purpose of RPAPL 1301(3) is 'to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt.'" *Ramirez*, 2020 WL 7647749 at *3 (*quoting Central Trust Co. v. Dann*, 85 N.Y.2d 767, 772 (1995)). The Appellate Division concluded that since the ability to bring the action on the promissory note was prohibited during the mortgage foreclosure, that period acted as a toll of the statute of limitations. *Id.*

Last, the Appellate Division found that the doctrine of collateral estoppel "does not apply to bar relitigation of a pure question of law" and that res judicata did not bar the action commenced in contract because "[t]he holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies." *Ramirez*, 2020 WL 7647749 at *2 (*citing, Gizzi v. Hall,* 309 A.D.2d 1140 (3rd Dep't 2003)).

The Appellate Division's ruling offers alternative remedies for creditors in New York where the statute of limitations expired on the mortgage debt. While the Appellate Division still recognized the statute of limitations begins upon the acceleration of the mortgage debt, this recent ruling requires another layer of analysis on whether a tolling period applies to a subsequent action for a money judgment against a borrower.

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