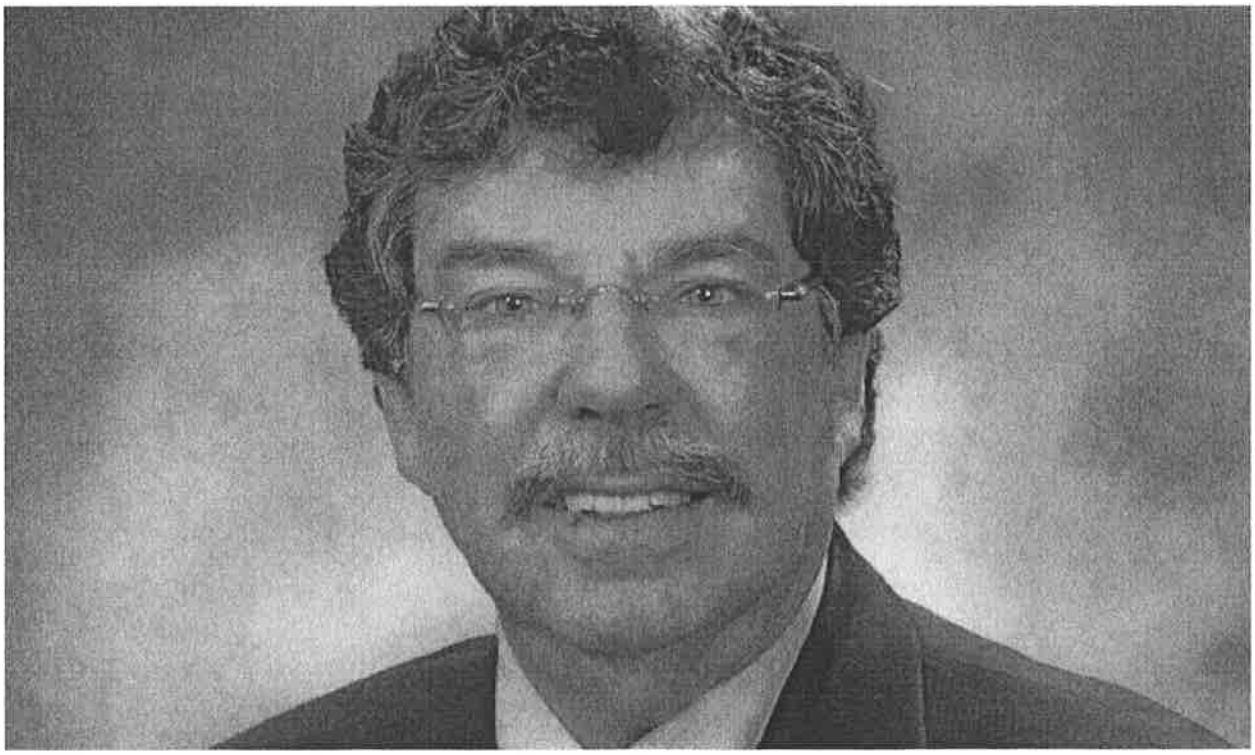
Liberal View Allowing Action Anew Barred by Statute of Limitations

In his Foreclosure Litigation column, Bruce Bergman discusses a "savings provision" contained in CPLR §205 which has received a helpful liberal interpretation by the Court of Appeals which permits a dismissed action to be initiated anew even though the statute of limitations had otherwise expired. This has the potential to avoid the anomaly of a defaulting borrower otherwise entitled to retain mortgage proceeds with no remedy for the lender.

By **Bruce J. Bergman** | October 15, 2019 at 11:27 AM



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Mortgage lenders, servicers and their counsel likely need not be reminded of the surfeit of cases dismissing foreclosure actions because the statute of limitations has run on the mortgage obligation. This causes affected plaintiffs to lament the seemingly anomalous situation of the borrower simply allowed to keep all the mortgage proceeds because some mishap caused the statute of limitations to expire. While sometimes the delay leading to such a draconian outcome may be attributable to the lender, on more than a few occasions it is not. Rather, the system imposes this under circumstances where many would find it more than dismaying, at least on the lender's side. In any event, this is a pervasive aspect of mortgage foreclosure practice in New York.

There should be an awareness as well, though, of a savings provision contained in New York statutes, of which we are reminded both by a salutary twist in a new case, *U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust* v. *Moomy-Stevens*, 167 A.D.3d 1380, 91 N.Y.S.3d 788 (3d Dept. 2018), as well as a particularly liberal interpretation of the statute expressed by the Court of Appeals in *U.S. Bank, N.A. v. DLJ Mortgage Capital, Inc.*, 33 N.Y.3d 72, 122 N.E.3d 240, 98 N.Y.S.3d 523 (2019).

The Statute

Proceeding to that statute, if the foreclosure action has been dismissed, by which time the statute of limitations has expired, there is authority (albeit with limitations), which allows the action to be initiated anew. Pursuant to CPLR §205 entitled "Termination of Action," if an action was timely commenced but later terminated in any manner other than as delineated, the plaintiff is permitted to commence a new action upon the same transaction within six months after the termination—notwithstanding that the statute of limitations would otherwise be a bar.

A number of provisos, however, limit the efficacy this authority to restart the action. The new action had to have been timely in the first instance when the prior action was commenced. Additionally, service upon the defendant must have been effected within that six-month period.

The most critical practical limiting factors mandated by the section are its unavailability if termination of the action was accomplished by voluntary discontinuance, neglect to obtain personal jurisdiction over the defendant, dismissal for want of prosecution or final judgment on the merits.

When all the conditions are met, prior action timely commenced, not dismissed via voluntary discontinuance, lack of personal jurisdiction or neglect to prosecute and no final adjudication on the merits, then commencing a new foreclosure within six months of the order of dismissal the otherwise concluded statute of limitations will not be a preclusion.

The Caselaw

In the 2018 case mentioned, although want of prosecution is a circumstance to deny restarting of the action, dismissal granted upon abandonment where the plaintiff waited more than a year to seek appointment of a referee, was found not the same as neglect to prosecute (pursuant to CPLR §3216); certainly where the court did not find specific conduct showing a general pattern of delay in proceeding with the litigation.

While this certainly seems correct, it may also be seen as a generous interpretation.

Perhaps more compelling on the issue of generous interpretation, in 2019, an authority no less than the Court of Appeals addressed the *overall* assessment of this very critical statute and, meaningfully for a foreclosing plaintiff needing to invoke the benefits of CPLR §205, underscored the liberal nature of the provision. (See *U.S. Bank National Association* v. *DLJ Mortgage Capital, Inc.*, supra)

It is there noted that the statute implements a policy preference of the Legislature to determine actions on the merits. *(U.S. Bank National Association* v. *DLJ Mortgage Capital Inc.*, 33 N.Y.3d 72, 122 N.E.3d 240, 98 N.Y.S.3d 523 (2019), citing *Goldstein* v. *New York State Urban Dev. Corp.*, 13 N.Y.3d 511, 521, 893 N.Y.S.2d 472, 921 N.E.2d 164 (2009)). Moreover, because the statute is interpreted as remedial in nature, it is designed to permit plaintiffs to avoid the harsh consequences of imposition of the statute of limitations, allowing the claims to be adjudged on their merits—so long as the prior action itself had been timely brought, thereby placing defendants on notice of the claims. (*U.S. Bank National Association* v. *DLJ Mortgage Capital Inc.*, 33 N.Y.3d 72, 122 N.E.3d 240, 98 N.Y.S.3d 523 (2019), citing *Malay* v. *City of Syracuse*, 25 N.Y.3d 323, 329, 12 N.Y.S.3d 1, 33 N.E.3d 1270 (2015)).

Where the facts at issue in a particular case may be viewed in the vernacular as a close call, the court also warns that the statute's "broad and liberal purpose is not to be frittered by any narrow construction." (*U.S. Bank National Association* v. *DLJ Mortgage Capital Inc.*, 33 N.Y.3d 72, 122 N.E.3d 240, 98 N.Y.S.3d 523 (2019),citing *Matter of Morris Invs.* v. *Commr. of Fin. of City of New York*, 69 N.Y.2d 933, 935, 516 N.Y.S.2d 635, 509 N.E.2d 329 (1987), quoting *Gaines* v. *City of New York*, 215 N.Y. 533, 539, 109 N.E. 594 (1915)).

Interesting and helpful too is the court's interpretation of the statute's effect:

if a timely brought action has been terminated for any reason other than one of the…reasons specified in the statute, the plaintiff may commence another action based on the same transactions or occurrences within six months of the dismissal of the first action, even if the second action would otherwise be subject to a Statute of Limitations defense, so long as the second action would have been timely had it been commenced when the first action was brought.

U.S. Bank National Association v. *DLJ Mortgage Capital Inc.*, 33 N.Y.3d 72, 122 N.E.3d 240, 98 N.Y.S.3d 523 (2019), citing *George* v. *Mt. Sinai Hosp.*, 47 N.Y.2d 170, 417 N.Y.S.2d 231, 390 N.E.2d 1156 (1979).

Finally as to the overall liberality of construction directed by New York's highest court, by the very terms of the statute it becomes operative when an action has been terminated for some fatal flaw—

but one unrelated the actual merits of the action; thus the statute is to be liberally construed. (*U.S. Bank National Association* v. *DLJ Mortgage Capital Inc.*, 33 N.Y.3d 72, 122 N.E.3d 240, 98 N.Y.S.3d 523 (2019), citing *Morris*, 69 N.Y.2d at 936, 516 N.Y.S.2d 635, 509 N.E.2d 329). Much comfort here for parties needing to avail themselves of CPLR §205.

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