

Outside Counsel

Statute of Limitations For Strict Foreclosure

The running of the statute of limitations is assuredly a major and continuing problem for mortgage holders—typically encountered not surprisingly in the mortgage foreclosure action itself.

That danger is exacerbated by the foreclosure abuse prevention act which denies to a foreclosing party the right to unilaterally withdraw an acceleration or cancel it by discontinuing the action.

But the concept is not confined solely to that arena. Rather, it can apply to what might be seen as peripheral pursuits, for example, the strict foreclosure.

The Basics

Just as a refresher, the strict foreclosure is an action begun after a foreclosure is completed to dispose of any party who could have been named as a defendant in that foreclosure but was not.

After all, if there is an interest that was not extinguished by the foreclosure, such as a junior mortgage, the new owner—the purchaser at the foreclosure sale—takes the property subject to that continuing interest.

That omitted junior interest could be a mechanic's lienor, a judgment creditor, a tenant or anyone else the foreclosure search may have missed. It could even be that the subordinate party was voluntarily excluded, but that leads to issues not the focus here.

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By
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Strict Foreclosure

The strict foreclosure action solves that problem by foreclosing the unnamed party's right of redemption—giving that party the right to pay the mortgage debt with interest and costs together with the value of all improvements and repairs to the property with taxes and other assessments and costs.

Since in a sense the strict foreclosure arises out of the defaulted mortgage and the mortgage foreclosure action, it is not irrational to think that perhaps the statute of limitations began to run at the inception of the foreclosure action itself.

In its most elemental form, and using the vernacular, the strict foreclosure says to the omitted party: "Had you been named and served in the foreclosure, you would have had a right to redeem. That was not made available to you; we offer that to you now."

'Avrahami'

A recent case, *517-525 W. 45 LLC v. Avrahami*, 202 A.D.3d 611, 164 N.Y.S.3d 106 (1st Dept. 2022), clarifies the statute of limitations aspect

in bringing a strict foreclosure.

In the cited case, the previously unnamed party, the subject of the strict foreclosure, argued that the statute of limitations began to run upon the filing of the original foreclosure action, which would (given the timeframe of that case) have barred the strict foreclosure.

This is understandable; a foreclosure action sometimes can consume six years, or more, and a subsequent strict foreclosure could be commenced only beyond that time of the foreclosure sale. Since in a sense the strict foreclosure arises out of the defaulted mortgage and the mortgage foreclosure action, it is not irrational to think that perhaps the statute of limitations began to run at the inception of the foreclosure action itself.

But that is not the law and as the cited case ruled, the six year statute of limitations did not begin to run until the property was sold at the foreclosure sale. Citing the statute, RPAPL §1352, and 4 *Bergman On New York Mortgage Foreclosures*, §32.03[1], the court observed the application of the strict foreclosure to be only after a foreclosure has been completed, that is, there has been a sale, with the strict foreclosure designed to cure a defect in the foreclosure judgment.

Conclusion

While there could often be jeopardy to a foreclosing party if the statute of limitations for a strict foreclosure commenced at the start of the foreclosure action, since it must await the sale in that action, there appears little risk of a statute of limitations barring a strict foreclosure. It should be meaningful to be familiar with the principle.