Outside Counsel

First Case To Rule On the Foreclosure Abuse Prevention Act

By now lenders, servicers and their attorneys should be well aware of the serious danger encountered by mortgage holders through multiple changes to law in the Foreclosure Abuse Prevention Act (the "Act"). While there is no doubt that peril lurks, there might be some room to assess the true depth of concern as the issues enfold and are litigated over time.

The first case to address any aspect—and there are so many—was reasonable, sensible and helpful, although it was at the trial court level. [*U.S. Bank National Association as Trustee* v. *Pierre*, 78 Misc.3d 870, 184 N.Y.S.3d 890 (Sup. Ct., Suff. Co,. 2023)]. This focused only upon a single portion of the Act, but certainly a meaningful one—the six-month grace period to begin a new action.

It has been the law [CPLR §205(a)] that if a foreclosure action has been dismissed, by which time the statute of limitations has expired, the plaintiff is permitted to commence a new action upon the same transaction within six months after termination; helpful, reasonable, time honored.

This ability is conditioned, however, upon certain standards: termination of the action cannot

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have arisen from voluntary discontinuance, or lack of personal jurisdiction, or want of prosecution or final judgment on the merits. Such have always been the constraints.

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The Act creates a new section 205-a, *adding* to the events which preclude starting a new action. This extensive list recites dismissal of the complaint for any form of neglect, including, but not limited to a host of statutory violations, including the breach of any court rule or individual part rule for failure to comply with any court scheduling order, or by default due to non-appearance for conference at a calendar call or by failure to timely submit any order or judgment.

The practical effect of this, which might be lost on non-practitioners, is that the sundry disqualification events can readily befall a case for the most innocent and unintended of reasons.

The Act substantially increases the likelihood that an action which has run afoul of the statute of limitations will not benefit from the ability to start the action anew within six months.

Precisely what miscues will bar use of the six-month window? Borrowers will argue that every mistake or misstep fits the statute and is fatal; lenders will disagree.

In the first case to consider such a point, a foreclosure was dismissed for failure to prove service of the pre-foreclosure 90-day notice, a continuing commonplace plague on lenders' houses.

By then the statute of limitations had expired (yes, six years passed) and so the borrower attacked the new foreclosure claiming that the lender had been neglectful, therefore excluded from availing itself of the six month window to initiate as new foreclosure. "No" ruled the court. Even applying the new statute (the Act), dismissal for want of the 90-day notice is not neglect—so that the plaintiff *does* receive the six-month saving period.

While this is helpful for lenders, and seems to augur well for foreclosing mortgage holders, we surely remain some years away from learning how devastating the Act will be.

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