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Court of Appeals

of the

State of New York

ACE SECURITIES CORP., HOME EQUITY LOAN TRUST,
SERIES 2006-SL2, by HSBC BANK USA, NATIONAL ASSOCIATION,
solely in its capacity as Trustee pursuant to a Pooling and Servicing Agreement,
dated as of March 1, 2006,

Plaintiff-Appellant,

– against –

DB STRUCTURED PRODUCTS, INC.,

Defendant-Respondent.

BRIEF OF *AMICUS CURIAE* ALBANY LAW SCHOOL PROFESSOR PATRICK M. CONNORS IN SUPPORT OF DEFENDANT-RESPONDENT AND AFFIRMANCE

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

I am the Albert and Angela Farone Distinguished Professor in New York Civil Practice at Albany Law School, where I teach courses in New York civil practice and professional responsibility, among other subjects. Pursuant to Rule 500.23(a)(4)(i) of this Court's Rules of Practice, I submit this brief because I expect it to be "of assistance to the Court" and because it may "identify law or arguments that might otherwise escape the Court's consideration." 22 N.Y.C.R.R. § 500.23(a)(4)(i). I have no personal or direct financial stake in the outcome of this litigation.[1] My teaching and scholarship concern New York civil procedure, and I have a professional interest in the sound and consistent development of New York law. This case presents another opportunity for the Court to render a decision interpreting CPLR 205(a) that will reinforce New York's long history of producing predictable and fair outcomes for litigants. I respectfully submit this brief to provide background on CPLR 205(a)'s structure, interpretation, and application, and to emphasize this appeal's importance to New York's civil procedure law.

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[1] Although I have been compensated at my typical hourly rate by UBS Real Estate Securities, Inc. for my time spent preparing this proposed *amicus curiae* brief, and I have been assisted in the preparation of this brief by counsel from Skadden, Arps, Slate, Meagher & Flom LLP, the opinions and conclusions expressed in the brief represent my own independent views. Furthermore, they do not represent the views of the institution at which I teach. No counsel for any party to this action contributed content to this brief or participated in the preparation of the brief in any other manner. No party or party's counsel contributed money that was intended to fund preparation or submission of this brief. *See* 22 N.Y.C.R.R. §500.23(a)(4)(iii).

INTRODUCTION

Under certain circumstances, CPLR 205(a) permits a litigant to commence a new lawsuit based upon an otherwise time-barred cause of action if that same cause of action was timely interposed and dismissed for certain reasons that do not go to its merits. Among other requirements, the statute demands that the "new action" be commenced by "the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator." CPLR 205(a). In this action, Plaintiff-Appellant urges the Court to fashion a rule that would extend the statute's benefits to a party who is different from, or even completely unrelated to, "the plaintiff" in the original action, so long as "the same legal rights are invoked and prosecuted" in both actions. (Pl.-Appellant Reply Br. at 3.) In my view, this position is inconsistent with the text of CPLR 205(a).

In *Reliance Insurance Co. v. PolyVision Corp.*, 9 N.Y.3d 52, 57 (2007), this Court unanimously adhered to an interpretation of CPLR 205(a) that applied the plain meaning of the statute's text and promulgated a straightforward rule for courts and litigants: unless the new plaintiff is either an executor or an administrator, "the benefit provided by the section is explicitly, and exclusively, bestowed on 'the plaintiff' who prosecuted the initial action." This interpretation can and should resolve the present dispute.

By contrast, Plaintiff-Appellant's proposed "same legal rights" test would violate the statute's plain meaning and prove difficult to apply in practice. It also threatens to undermine the fundamental purposes of CPLR 205(a) and New York's statutes of limitations, and would permit and possibly encourage gamesmanship by allowing a party to purport to sue on behalf of another party despite no legal right to do so, thus creating a risk of unpredictable and inequitable outcomes. *See infra* at 12-15.

ARGUMENT

I. CPLR 205(A) REQUIRES THAT THE SAME PLAINTIFF COMMENCE BOTH THE PRIOR AND THE NEW ACTIONS.

From time to time, a litigant may attempt to vindicate her rights through a timely lawsuit, but the action is dismissed for some reason unrelated to the action's merits and the litigant's diligence in prosecuting the action. That litigant may wish to assert those same claims in a new action, only to find that the statute of limitations has now expired. CPLR 205(a) is meant to address just such a situation by "provid[ing] a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim." *George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 178-79 (1979).

In relevant part, CPLR 205(a) states:

> If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

CPLR 205(a).

CPLR 205(a)'s text contains several independent requirements for commencing a new action:

- the prior action was "timely commenced";
- the prior action was not "terminated" for one of four reasons (i.e., "a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits");
- the new action is commenced by "the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator";

- the new action is based "upon the same transaction or occurrence or series of transactions or occurrences" that were the subject of the prior action;
- the new action is commenced "within six months after the termination [of the prior action] provided that the new action would have been timely commenced at the time of commencement of the prior action"; and
- "service upon defendant is effected within such six-month period."

Of particular note in this appeal is the requirement that the new action be brought by "the plaintiff," except "if the plaintiff dies, and the cause of action survives, [by] his or her executor or administrator." The phrase "the plaintiff" in CPLR 205(a) can only refer to the plaintiff that commenced the prior action. Indeed, the statute's special rule for executors and administrators only makes sense if "the plaintiff" refers to the plaintiff from the prior action. This rule for executors and administrators requires "the plaintiff" to have died before the filing of the "new action," thus providing an opportunity for the "executor or administrator" to then "commence a new action." *See Reliance*, 9 N.Y.3d at 57 ("Only if 'the plaintiff' dies, and his or her cause of action survives, may the executor or administrator of a deceased plaintiff's estate commence a new action based on the same occurrence.").

The statute's text contains no indication that its benefits would flow to any individual or entity other than "the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator." When the drafters of the CPLR intended to expand the applicability of a provision, they said so with express language. For example, when a CPLR provision applies both to a party and to a party united in interest with that party, the provision expressly provides for that application. *See, e.g.*, CPLR 203(b) ("the defendant or a co-defendant united in interest with such defendant"); CPLR 203(c) ("the defendant or a co-defendant united in interest with such defendant"); CPLR 3020(d) ("if two or more parties [are] united in interest"). Likewise, the CPLR also expressly specifies when a provision applies both to a party and its successor in interest. *See, e.g.*, CPLR 203(e) ("another action brought by the plaintiff or his successor in interest"); CPLR 3117(c) ("brought between the same parties or their representatives or successors in interest"). Here, by contrast, CPLR 205(a)'s benefits are bestowed only upon "the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator."

More than a century ago, then-Judge Cardozo stated that CPLR 205(a)'s materially similar predecessor statute, Section 23 of the Civil Practice Act ("CPA"), was "designed to insure to the *diligent* suitor the right to a hearing in court till he

reaches a judgment on the merits."[2] *Gaines v. City of New York*, 215 N.Y. 533, 539 (1915) (Cardozo, J.) (emphasis added); *see also George*, 47 N.Y.2d at 180 ("[T]he statute is intended to protect only those plaintiffs who have been nonsuited despite their continued opposition to that fate."). This emphasis on diligence explains the statute's textual requirement that the same plaintiff bring both actions. As the U.S. Court of Appeals for the Second Circuit aptly explained: "[T]o receive the benefit of 205(a) tolling, the litigant must have prosecuted his original claim diligently . . . . In short, the purpose of 205(a) is to save cases otherwise dismissed on curable technicalities—but only when the litigant has *diligently* prosecuted the claim." *Doyle v. Am. Home Prods. Corp.*, 583 F.3d 167, 171 (2d Cir. 2009) (emphasis in original); *see also Chavez v. Occidental Chem. Corp.*, 35 N.Y.3d 492, 502 (2020) ("[L]imitations periods are intended to put defendants on notice of adverse claims

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[2] In 1962, CPLR 205(a) superseded Section 23 of the CPA as part of the CPLR's general replacement of the CPA of 1921. *See* Sixth Report to the Legislature by the Senate Finance Committee Relative to the Revision of the CPA, N.Y. Legis. Doc. No. 8, at 75-76 (1962) [hereinafter Sixth Report]; David D. Siegel & Patrick M. Connors, *New York Practice* § 2 (6th ed. 2018). The statutes are largely the same. Section 23 of the CPA reads in relevant part:

> If an action is commenced within the time limited therefor and a judgment therein is reversed on appeal without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies and the cause of action survives, his representative, may commence a new action for the same cause after the expiration of the time so limited and within one year after such a reversal or termination.

1920 N.Y. Laws vol. IV, at 30 (ch. 925, N.Y. CPA § 23).

and to prevent plaintiffs from sleeping on their rights . . . .” (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983))).

II. IN INTERPRETING CPLR 205(A)’S STATUTORY TEXT, THIS COURT PROMULGATED A CLEAR SAME-PLAINTIFF RULE IN *RELIANCE*.

In *Reliance*, this Court considered “whether CPLR 205(a) allows for commencement of the new action by an entity that is different from, but related to, the original corporate plaintiff.” *Reliance*, 9 N.Y.3d at 56. Relying on the statute’s text and its prior jurisprudence on the issue, the *Reliance* Court adopted a bright-line rule, holding that “the benefit provided by the section is explicitly, and exclusively, bestowed on ‘the plaintiff’ who prosecuted the initial action.” *Id.* at 57 (quoting CPLR 205(a)); *see also id.* at 58 (“[W]e prefer to read CPLR 205(a) as it was written by the Legislature and has consistently been applied by this Court.”). Applying this plain meaning test, the Court declined to allow a parent corporation to commence a new action, pursuant to CPLR 205(a), where the prior action was improperly commenced by its wholly-owned subsidiary. *See id.* at 55-56, 58.

This Court’s same-plaintiff rule was explained long ago in *Streeter v. Graham & Norton Co.*, 263 N.Y. 39 (1933), a decision relied upon 74 years later in *Reliance*. *See Reliance*, 9 N.Y.3d at 57 (citing *Streeter*, 263 N.Y. at 44). In *Streeter*, this Court held that Section 23 of the CPA, CPLR 205(a)’s predecessor statute, “applies only where the second action is brought by the same plaintiff, ‘or, if he dies and the cause

of action survives, his representative.'"[3] *Streeter*, 263 N.Y. at 43-44. The *Streeter* Court recognized that "[t]o grant the right conferred by section 23, Civil Practice Act, to a different party plaintiff, representing in part different interests, would require the placing of a construction upon the section plainly beyond its intent and purpose." *Id.* at 44; *cf. Chavez*, 35 N.Y.3d at 505 ("'As a rule . . . time limitations created by statute are not tolled in the absence of statutory authority' because '[c]ourts may only construe provisions made by the Legislature creating exceptions or interruptions to the running of the time limited by statute' and 'may not themselves create such exceptions.'" (alterations in original) (quoting *Matter of King v. Chmielewski*, 76 N.Y.2d 182, 187 (1990))).

To be sure, the *Reliance* Court also acknowledged that CPLR 205(a) did not require that executors and administrators meet the same-plaintiff rule. *Reliance*, 9 N.Y.3d at 57. Notably, even in recognizing the statute's express special rule for executors and administrators, the *Reliance* Court emphasized the general rule: "the plaintiff" means "the original plaintiff." *Id.*

As the *Reliance* Court observed: "Pivotal here is that, unlike the scenario in *George*, [the parent company in the subsequent action] is seeking to enforce its own, separate rights, rather than the rights of the plaintiff in the original action." *Id.*

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[3] One of the few changes made by the legislature in the transition from Section 23 of the CPA to CPLR 205(a) was changing "representative" to "executor or administrator." *See* Sixth Report, *supra* note 2, at 75-76.

According to Plaintiff-Appellant, this statement endorses its "'same rights' test" and repudiates the "'same plaintiff' approach." (Pl.-Appellant Opening Br. at 17.) To the contrary, this language in *Reliance* affirms, and is limited to, the Court's prior interpretation of the statute's express special rule for administrators and executors. It is an administrator or executor who seeks to enforce "the rights of the plaintiff in the original action"—i.e., the decedent's rights. *Reliance*, 9 N.Y.3d at 57. That is why the *Reliance* Court emphasized that "[o]utside of *this representative context*, we have not read 'the plaintiff' to include an individual or entity other than the original plaintiff." *Id.* (emphasis added).

The *Reliance* Court's same-plaintiff rule can be read harmoniously with the Court's prior decisions in *Carrick v. Central General Hospital*, 51 N.Y.2d 242 (1980), and *George*, 47 N.Y.2d 170. In *Carrick*, the same plaintiff brought both the prior action and the new action. *See Carrick*, 51 N.Y.2d at 246. The only difference between the actions was that the plaintiff had not yet received the requisite "letters of administration" before bringing the prior action. *See id.* In *George*, the prior action was mistakenly brought in the name of the decedent, rather than in the name of the administrator, and the Court permitted the administrator to commence a new action under CPLR 205(a). *See George*, 47 N.Y.2d at 173-74, 180. Because the first plaintiff had died before the first suit was filed, the case's quirky facts were a clumsy fit with the statute. However, the administrator in the subsequent action was "acting

as the representative of the named plaintiff in the prior action," *id.* at 179—the capacity expressly provided for in the statute. Importantly, the *Reliance* Court quoted *George* for the general rule that "the fact that one party commenced an action which is subsequently dismissed, will not serve to justify application of the subdivision so as to support a later action by a different claimant." *Reliance*, 9 N.Y.3d at 57 (quoting *George*, 47 N.Y.2d at 179).

Some lower courts have extended the benefits of CPLR 205(a) to bankruptcy trustees. *See, e.g.*, *Goldberg v. Littauer Hosp. Ass'n*, 160 Misc. 2d 571, 575-76 (Sup. Ct. Albany Cnty. 1994). To my knowledge, this Court has never addressed the applicability of CPLR 205(a) to bankruptcy trustees and need not do so here. Although these lower courts have, either implicitly or explicitly, analogized bankruptcy trustees to administrators or executors, that circumstance is not addressed by the text of the statute. In any case, it is unnecessary for the Court to reach the issue of a bankruptcy trustee's invocation of CPLR 205(a) to resolve the case before it.[4]

[4] Plaintiff-Appellant contends that this Court's decision in *Van der Stegen v. Neuss, Hesslein & Co.* allowed a "nominally distinct plaintiff[]," such as a bankruptcy trustee, "to invoke CPLR 205(a)." (Pl.-Appellant Opening Br. at 18 & n.14 (citing *Van der Stegen*, 270 N.Y. 55, 60-63 (1936)).) The *Van der Stegen* Court explicitly declined, however, to reach the statute's applicability. *See Van der Stegen*, 270 N.Y. at 63 ("We do not touch upon the effect of section 23 of the Civil Practice Act, as the above ruling renders it unnecessary.").

III. DEPARTING FROM *RELIANCE*'S SAME-PLAINTIFF RULE WOULD PRODUCE UNPREDICTABLE OUTCOMES.

The *Reliance* Court's same-plaintiff rule applies the text of "CPLR 205(a) as it was written by the Legislature and has consistently been applied by this Court" and produces fair, predictable outcomes. *Reliance*, 9 N.Y.3d at 58. It accords with the statute's purpose of "provid[ing] a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim." *George*, 47 N.Y.2d at 178-79.

Plaintiff-Appellant contends that CPLR 205(a) allows for the commencement of a new action by an entity that is different from, and potentially completely unrelated to, the original plaintiff, so long as "the same legal rights are invoked and prosecuted in the revival action as were asserted in the antecedent action." (Pl.-Appellant Reply Br. at 3; *see also id.* at 26.) As an initial matter, this test is not supported by the text of CPLR 205(a) or this Court's jurisprudence interpreting the statute. Furthermore, it is vague and ambiguous, and would be exceedingly difficult to apply. This Court has repeatedly emphasized the need for predictability in the statute of limitations context, where "the need for clarity and consistency [is] at [its] zenith." *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, 19 (2021). Just recently, the Court reaffirmed "the need for reliable and objective rules permitting consistent application of the statute of limitations to claims arising from commercial

relationships." *Id.* at 20 (citing *ACE Sec. Corp., Home Equity Loan Tr., Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 593-94 (2015)); *see also Freedom Mortg. Corp.*, 37 N.Y.3d at 32 (noting this Court's "precedent favoring consistent, straightforward application of the statute of limitations which serves the objectives of 'finality, certainty and predictability,' to the benefit of both borrowers and noteholders" (quoting *ACE Sec. Corp.*, 25 N.Y.3d at 593)). As a result, this Court has repeatedly emphasized the importance of "clear rule[s]" which "make[] it possible for attorneys to counsel their clients accordingly." *Id.* The alternative—a "post hoc, case-by-case approach" which could "turn on courts' after-the-fact analysis"—is "incompatible with the policy underlying the statute of limitations." *Id.* at 31-32.

Plaintiff-Appellant's suggested approach will raise significant questions about how and whether the "same legal rights" are implicated by different, even unrelated, parties. (*See* Pl.-Appellant Reply Br. at 3.) This would, in the words of the *Reliance* Court, threaten to "open a new tributary in the law" and "breathe life into otherwise stale claims" because we cannot "know[] precisely what [this rule] means or portends." *Reliance*, 9 N.Y.3d at 58. It would also undermine the repose that statutes of limitation are meant to provide to defendants. *See Flanagan v. Mount Eden Gen. Hosp.*, 24 N.Y.2d 427, 429 (1969). When the proper plaintiff has not yet sued a defendant by the expiration of the statute of limitations, that defendant is

entitled to assume that she is safe from suit. *See Freedom Mortg.*, 37 N.Y.3d at 20 ("Statutes of limitations advance our society's interest in 'giving repose to human affairs.'" (quoting *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 550 (1979))); *Chavez*, 35 N.Y.3d at 505 ("[O]ur statute of limitations doctrines are intended to promote repose . . . ."). But under Plaintiff-Appellant's proposed test, it is difficult to predict when a different plaintiff may capitalize on another party's prior action by commencing a new action after the expiration of the statute of limitations. Finally, the Plaintiff-Appellant's proposed test essentially ignores the fact that CPLR 205(a) is designed to protect the litigant who has diligently prosecuted its claim. *See supra* at 6-8. A litigant who has stood by while the statute of limitations was expiring and allowed another entity to prosecute its claim can hardly be considered "diligent."

Plaintiff-Appellant's proposed rule raises other complicated questions. For example, under New York law, a plaintiff may commence an action and then decide to voluntarily discontinue it. *See* CPLR 3217(a), (b). Such "a voluntary discontinuance" of the prior action would prevent the plaintiff from relying on CPLR 205(a) to commence a new action. *See, e.g.*, *Fed. Nat'l Mortg. Ass'n v. Jeanty*, 188 A.D.3d 827, 830 (2d Dep't 2020). Similarly, in most instances where actions are commenced by a summons with notice, the defendant customarily serves a demand for the complaint. *See* CPLR 320(a), 3012(b); Siegel & Connors, *supra* note 2, § 60.

Once the notice of appearance and demand for the complaint are served, the plaintiff has twenty days to serve the complaint. *See* CPLR 3012(b). If a plaintiff fails to serve the complaint within the twenty-day period—a not infrequent happening in New York practice—the action may be dismissed. *See id.* Courts have concluded that a dismissal for failure to serve a complaint under CPLR 3012(b) qualifies as a "neglect to prosecute" within the meaning of CPLR 205(a). *See, e.g.*, *Benedetto v. Hodes*, 112 A.D.2d 393, 394 (2d Dep't 1985); *Schwartz v. Luks*, 46 A.D.2d 634, 634 (1st Dep't 1974); *Wright v. Farlin*, 42 A.D.2d 141, 143 (3d Dep't 1973). Therefore, even though the dismissal is not on the merits, a plaintiff whose action is dismissed in this fashion for conduct constituting neglect cannot invoke CPLR 205(a).

In either of the above two scenarios, would an RMBS certificateholder's voluntary discontinuance or failure to serve a complaint prevent an RMBS trustee from relying on CPLR 205(a) to revive the certificateholder's action after the expiration of the statute of limitations? In other words, could the trustee still invoke CPLR 205(a), enjoying the benefits of the certificateholder's prior action, without suffering the consequences of its flaws? Could the trustee argue that its opportunity to invoke CPLR 205(a) should not be jeopardized by another party who sought to prosecute the trustee's legal rights, but did so in a reckless fashion?

The Court can avoid all of these troublesome questions by reaffirming the same-plaintiff rule expounded in its *Reliance* decision—a decision that was intended

to "determine not only the pending case but also future cases." *Reliance*, 9 N.Y.3d at 56.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should reaffirm the same-plaintiff rule that it elucidated in *Reliance* and hold that the benefits of CPLR 205(a) are not available to Plaintiff-Appellant in this case.

Dated: New York, New York
August 27, 2021

Respectfully submitted,

By: [signature]

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 N.Y.C.R.R. Part 500.1(j) that the foregoing brief was prepared using Microsoft Word.

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Dated: New York, New York
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