To Be Argued By:
Peter K. Kamran
Time Requested: 15 Minutes

APL-2018-00166

Suffolk County Clerk's Index No. 21853/14
Appellate Division, Second Department Docket No. 2015-10458

Court of Appeals

STATE OF NEW YORK

GREGG LUBONTY,

Plaintiff-Appellant,

against

U.S. BANK NATIONAL ASSOCIATION, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2005-4A, and AMERICAN HOME MORTGAGE INVESTMENT TRUST 2005-4A,

Defendants-Respondents.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

LESTER & ASSOCIATES, P.C.
Attorneys for Plaintiff-Appellant
600 Old Country Road, Suite 229
Garden City, New York 11530
516-357-9191
pkamran@rlesterlaw.com

Of Counsel:
Peter K. Kamran

Date Completed: February 8, 2019

TABLE OF CONTENTS

CASE **PAGE WHERE CITED**

STATUTORY AUTHORITY	**PAGE WHERE CITED**
11 USC § 362(a)	1, 2
11 USC § 524	8
Cal. Code Civ. Proc. 356	8
Cal. Code Civ. Proc. 916	9
CPLR 204(a)	passim
CPLR 205(a)	12, 13, 16
CPLR 304(a)	5, 6
CPLR 306-b	13, 14, 16
CPLR 213(4)	1, 3
CPLR 3211(a)(4)	10
RPAPL Art. 13	5, 6
RPAPL 1501(4)	1
UCC 9-610	5, 6

PRELIMINARY STATEMENT

The underlying action was commenced pursuant to New York Real Property Actions and Proceedings Law § 1501(4) seeking to expunge a mortgage lien against real property as unenforceable due to the expiration of the statute of limitations pursuant to CPLR 213(4). Through this appeal Appellant is seeking this Honorable Court's review of the Decision and Order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated March 28, 2018 (the "Decision"). Record of Appeal [hereinafter "R"] 258-260. The Decision affirmed the Supreme Court's dismissal of Appellant's complaint against U.S. National Bank Association, as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A, and American Home Mortgage Investment Trust 2005-4A (the "Respondent") upon a finding that the six-year statute of limitations for a mortgage foreclosure was tolled pursuant to CPLR 204(a) based on Appellant's two bankruptcy filings. Id.

However, CPLR 204(a) clearly provides that its tolling provisions are only applicable when a stay, such as the bankruptcy stay of 11 USC § 362(a), prevents the commencement of an action. CPLR 204(a). In Appellant's case, both of Appellant's bankruptcy filings occurred subsequent to the commencement of foreclosure actions, thus not invoking or implicating in any way the tolling

provisions of CPLR 204(a) and serving only to stay the continuation of the already commenced foreclosure actions.

Furthermore, as will be shown below, Respondent's arguments on appeal are supported by neither the relevant caselaw nor any pressing public policy concern and in fact are contrary to both.

As such, Appellant respectfully reiterates that the Appellate Division erred in holding that the tolling provisions of CPLR 204(a) applied in Appellant's case as the automatic stays pursuant to 11 USC § 362(a) never stayed Respondent's commencement of an action as contemplated by CPLR 204(a).

QUESTION PRESENTED

As stated in Appellant's initial brief, this appeal presents a narrow question of law, to wit:

Whether Respondent was stayed from commencing a foreclosure action within the meaning of CPLR 204(a), thus tolling the running of the statute of limitations, when foreclosure actions had already been commenced by Respondent prior to Appellant's bankruptcy filings.

ARGUMENT

I. THE PLAIN LANGUAGE OF CPLR 204(a) TOLLS THE STATUTE OF LIMITATIONS ONLY WHEN THE COMMENCEMENT OF AN ACTION HAS BEEN STAYED

Respondent in its opposition brief goes to great lengths to show that the automatic stay triggered by Appellant's two bankruptcy filings somehow tolled the six-year statute of limitations contained in CPLR 213(4). However, the difference in the fact patterns of each case cited by Respondent shows that Respondent's argument has no merit and would require the Court to read more into a statute that is quite clear and unambiguous.

Initially, Respondent's argument that Appellant somehow misinterprets the facts as set forth in *MLG Capital Assets, LLC v. Judith Eidelkind Trust*, 275 A.D.2d 357 (2d Dep't. 2000) is not correct.

By reaffirming the mortgage loan debt the borrowers in *MLG Capital* started the statute of limitations running anew. However, the borrowers were still under the protection of the automatic stay when they reaffirmed the debt so the statute of limitations was immediately tolled pursuant to CPLR 204(a). Respondent is correct that CPLR 204(a) tolling was still necessary for the plaintiff in *MLG Capital* to have brought its second foreclosure action timely, but again, this is irrelevant to the issue presented in this appeal.

Respondent likewise mistakenly cites *PSP-NC, LLC v. Raudkivi*, 138 A.D.3d 709 (2d Dep't. 2016) for the proposition that CPLR 204(a) tolls the statute of limitations despite the fact that the plaintiff in that case had already commenced a foreclosure action. However, a simple reading of the *Raudkivi* decision reveals that the borrower in that case, just like in *MLG Capital*, had reaffirmed the mortgage debt during the borrower's bankruptcy case re-starting the six-year statute of limitations while the automatic stay remained in effect – thus immediately tolling the statute of limitations. Thus Appellant believes the *Raudkivi* court was equally correct.

However, the critical distinction between *MLG Capital* and *Raudkivi* on the one hand and the fact pattern presented in this instant appeal is that it is undisputed that Appellant never reaffirmed the mortgage debt. This distinction is critical since reaffirmation of the debt re-starts the six year statute of limitations and if that six-year period is re-started while a stay is in effect it is automatically tolled pursuant to CPLR 204(a). That is not the case presented here.

Respondent next attempts to rely on upon *In re Strawbridge*, 2012 WL 701031 (S.D.N.Y. Mar. 6, 2012). In *Strawbridge,* the court held that, after the debt secured by the shares in the debtor's cooperative apartment had been accelerated but before the lender had commenced an action against the debtor, where the debtor repeatedly obtained stays of the lender's efforts to hold an auction sale of

the debtor's cooperative shares, CPLR 204(a) was applicable and, as such, tolled the statute of limitations during the multiple stays. Id. at 9.

Strawbridge is inapposite to this case because it involves a situation wholly divorced from the events at hand. *Strawbridge* involved a secured lender's auction sale of shares in a cooperative apartment. Id. Ownership of shares in a cooperative apartment are personalty. "Cooperative apartments are personal property, not real property. Accordingly, a contract for the sale of a cooperative apartment, in reality a sale of securities in a cooperative corporation, is governed by the Uniform Commercial Code". *LI Equity Network, LLC v. Vill. in the Woods Owners Corp.*, 79 A.D.3d 26, 30, (2d Dep't. 2010) (internal citations and quotations omitted).

As such, a lender has two options when contemplating how to enforce its security interest upon a default by the borrower. The first option is a judicial foreclosure pursuant to RPAPL Article 13. This would entail commencing an action within the meaning of CPLR 204(a) and 304(a).

The second option, and the one chosen by the lender in *Strawbridge,* is a non-judicial foreclosure sale pursuant to UCC 9-610 which provides that "when a debtor defaults on a security agreement, the secured party 'may sell, lease, license, or otherwise dispose of any or all of the collateral'". *LI Equity Network, LLC* at 30.

This does not require "commencement" of an action as contemplated by CPLR 204(a) and 304 as it is an extra-judicial proceeding. In *Strawbridge*, however, the non-judicial UCC auction sale never occurred due to multiple stays obtained by Ms. Strawbridge. *Strawbridge* at 1. Thus, because the non-judicial UCC auction sale never actually occurred, the lender never exercised its right to resort to a judicial foreclosure; i.e. commence an action pursuant to RPAPL Article 13. Therefore, the lender in *Strawbridge* was, in fact, stayed from commencing an action by the repeated stays obtained by Ms. Strawbridge. As such, in *Strawbridge*, the court was correct when it stated that CPLR 204(a) was applicable.

Respondent's confusion is understandable as the court in *Strawbridge* does not make a distinction between a sale pursuant to UCC Art. 9 and the commencement of a foreclosure action pursuant to RPAPL Art. 13 (the first being a non-judicial sale and the second requiring the commencement of a foreclosure action).

The *Strawbridge* court confusingly utilizes the term "foreclose" when it states "immediately before Indymac was to foreclose on the collateral (and, therefore, the apartment), Strawbridge filed her first petition for relief under Chapter 13 of the Bankruptcy Code." *Strawbridge* at 1. And again, when it states that "after Strawbridge failed to make required payments, Indymac accelerated the loan, triggering the statute of limitations, and a foreclosure auction was scheduled

for November 14, 2002". Id. at 9. However, it is clear from even a cursory reading of the March 5, 2010 Opinion and Order of United States Bankruptcy Judge Martin Glenn converting Ms. Strawbridge's bankruptcy case from Chapter 11 to Chapter 7 that the lender's auction sales were sales pursuant to UCC Art. 9, not foreclosure sales pursuant to the commencement of foreclosure actions. A copy of Judge Glenn's March 5, 2010 Opinion and Order can be found in the Record on Appeal at R. 233 – 242.

There is a subtle, but highly significant and dispositive, distinction between the facts in *Strawbridge* and the facts in the case at hand which is fatal to the Respondent's argument. In *Strawbridge*, the lender had never actually commenced a foreclosure action whereas, in the case at hand, AHMA successfully commenced the First Foreclosure action prior to the First Bankruptcy and US Bank successfully commenced the Second Foreclosure action prior to the Second Bankruptcy case. This subtle distinction is the difference between the applicability and inapplicability of CPLR 204(a).

Respondent next resorts to citing cases from sister states with tolling statutes similar to CPLR 204(a), however, like the above discussed cases, none of these are on point either.

Respondent initially cites *Fiero v. Perle*, 2013 WL 6480428 (Cal. Ct. App. Dec. 10, 2013) to support its position.

However, if one actually reads the fact pattern presented in *Fiero* it is clear that it is not applicable to the instant case. In *Fiero* the plaintiff timely commenced an action to enforce a previously awarded judgment, but unbeknownst to plaintiff the defendant had already filed bankruptcy and obtained a discharge. Once plaintiff became aware of the discharge plaintiff successfully moved to reopen defendant's bankruptcy case and have the judgment declared non-dischargeable. Only then, when free of the discharge injunction pursuant to 11 U.S.C. §524, could plaintiff commence a valid action to enforce its judgment. See Id.

Therefore, since the plaintiff in *Fiero* had unknowingly commenced its first action to enforce the judgment while the discharge injunction was in place it stands to reason that the statute of limitations was tolled for the time it took plaintiff to obtain the non-dischargeability determination. Clearly the fact pattern in *Fiero* is inapposite to the fact pattern presented herein.

Next Respondent cites another California case, *Paniagua v. Orange Cty. Fire Auth.*, 149 Cal. App. 4th 83 (Cal. Ct. App. 4th Dist. 2007) for the proposition that Cal. Code Civ. Proc. 356 applied to toll the statute of limitations despite the prior commencement and dismissal of an action without prejudice. Again, Respondent is incorrect. In *Paniagua*[1] the plaintiff filed a petition attempting to obtain relief from the condition precedent requirement of filing a notice of claim

[1] Plaintiff in *Paniagua* had already commenced an action against an individual but had not named the public entities as defendants.

against a public entities prior to commencing an action against a public entity. The lower court denied the petition and plaintiff appealed that denial. Id. at 86.

The *Paniagua* court held that plaintiff's "appeal from the order denying his application for relief from the claim filing requirement tolled the statute of limitations."[2] *Paniagua* at 88. This, likewise makes sense because the plaintiff in *Paniagua* had not yet commenced an action against the public entity defendants (only against the individual defendant).

Next Respondent cites to *Seamans v. Walgren*, 82 Wash. 2d 771, (Wa. 1973) again for the proposition that courts have applied tolling statutes similar to CPLR 204(a) in similar situations as presented here. Again, Respondent is mistaken.

The plaintiff in *Seamans* filed suit in the first week of January 1972 a month before the expiration of the statute of limitations. However, "[a]ppellant was immune from service of process 321 days between February 13, 1969 and February 13, 1972, the period of the running of the statute of limitations. Since appellant was personally served on September 23, 1972, 223 days after February 13, 1972, the statute of limitations had not run by that time and the lower court properly obtained jurisdiction over him. The period of time appellant was

[2] Cal. Code Civ. Proc. 916 provides that, except in certain circumstances, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby.

unavailable for service is properly added to determine the length of time the statute has been tolled." *Seamans* at 775.

Respondent additionally cites to *Merceri v. Deutsche Bank AG*, 2 Wash.App.2d 143 (Ct. App. Wa. Jan. 22, 2018) for a similar proposition. However, a reading of *Merceri* reveals that the mortgagee in *Merceri*, like in *Strawbridge* above, had accelerated the mortgage debt and attempted nonjudicial sales of the mortgaged property prior to the borrower's bankruptcy filing, but had not commenced a judicial action until well after the bankruptcy case was closed. *Merceri* at 145. Thus, like in *Strawbridge*, the automatic stay acted to prevent the mortgagee from commencing an action.

Finally, Respondent cites to *Hutchings v. Royal Bakery & Confectionery Co.*, 66 Or. 301 (Or. 1913). In *Hutchings* the court found that the tolling provisions applied to the statute of limitations because "[b]y sections 68, 71, L.O.L., another action cannot be maintained while a former one is pending between the same parties for the same cause." *Hutchings* at 303. This is not the case in New York that a subsequent action *cannot* be maintained if a previous case remains pending. CPLR 3211(a)(4) specifically provides that "the court need not dismiss upon this ground but may make such order as justice requires".

In point of fact no case cited by Respondent presents the same fact pattern as is presented herein and all are easily distinguishable on their facts.

On the other hand, *Beneficial Homeowner Service Corp. v. Tovar*, is analogous to this case because it features a bankruptcy filing preceded by the commencement of a foreclosure action. *Beneficial Homeowner's Service Corp. v. Tovar*, Index No. 61092/2014 (Sup. Ct. Suffolk County 2014) (unpublished decision provided in Appellant's Addendum to this Reply Brief)[3]. On a fact pattern analogous to the one herein the court in *Tovar* stated:

> "The tolling of a statute of limitation period pursuant to CPLR § 204 (a) only applies when a "stay" affects "the commencement of an action". As such, Plaintiff does not benefit of any tolling of the statute of limitation period under CPLR § 204 (a) because Defendant's Chapter 13 bankruptcy filing did not stay Plaintiff's ability to commence an action. Indeed, Plaintiff had already commenced the action on October 4, 2007, whereas Defendant filed for Bankruptcy protection in April, 2009."
>
> *Tovar* at pg. 3.

This is precisely the situation presented in the instant appeal and despite Respondent's assertions to the contrary, the correct result.

[3] The Supreme Court's decision in *Tovar* was affirmed by the Appellate Division, Second Department in *Beneficial Homeowner Serv. Corp. v. Tovar*, 150 A.D.3d 657 (2d Dep't. 2017), however the Appellate Division's decision is silent as to the effect of the defendant's bankruptcy filing on the statute of limitations.

II. APPELLANT'S INTERPRETATION OF CPLR 204(a) COMPORTS WITH LEGISLATIVE INTENT AND THE CPLR

Respondent in its opposition brief argues that Appellant's interpretation of CPLR 204(a) would lead to absurd results and betray the purpose of the statute, would promote litigation gamesmanship; and, further incentivize defendants to obtain stays, allow the statute of limitations to expire, and then spring some technical reason for dismissal on a plaintiff who would then have no opportunity to cure the defect.

This is not true for a number of reasons. First, Respondent completely ignores the fact that the New York State Legislature has already addressed this very issue through the enactment of CPLR 205(a). CPLR 205(a) provides in relevant part as follows:

> "New action by plaintiff. 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, . . . 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."

Thus, the Legislature has already provided plaintiffs with an overall savings provision from the statute of limitations if a plaintiff's case was terminated for any reason other 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.

Appellant is aware of the fact that in the case at bar Respondent's Second Foreclosure Action was dismissed for lack of personal jurisdiction and that this is one of the specific reasons carved-out of the savings provisions contained in CPLR 205(a).

However, the Legislature has also enacted CPLR 306-b which provides that a plaintiff must serve a defendant with a summons and complaint within 120 days of the filing, but also allows a plaintiff to seek to extend the 120 day period for good cause or in the interests of justice. See CPLR 306-b.

Here it must be remembered that by November 26, 2013 (the time the automatic stay was lifted in the Second Bankruptcy case)[4] 132 days had elapsed since Respondent's filing of the summons and complaint on June 9, 2011 in the

[4] As a result of the automatic stay Respondent was prevented from taking any actions in the Second Foreclosure Action during the period October 19, 2011 through November 25, 2013.

Second Foreclosure Action, a mere twelve days more than provided for in CPLR 306-b.

Moreover, at that time (November 26, 2013) Respondent had been in possession of Appellant's motion to dismiss for over two years – more than enough time to determine a course of action and litigation strategy with respect to the Appellant's allegations regarding lack of personal service[5].

Being well aware, Respondent could have easily brought a motion pursuant to CPLR 306-b to extend the 120 days for either good cause or in the interests of justice. Under "[t]he interest of justice standard . . . the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, *including expiration of the Statute of Limitations*, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105–06 (2001) (emphasis added).

However, rather than seek to avail itself of the above provision enacted by the Legislature (the obvious solution in this situation), as its litigation strategy Respondent chose solely to fight out the issue of whether service of process had been properly made – and lost. For obvious reasons Respondent now claims its hands were tied rather than admit its voluntarily chosen litigation strategy failed.

[5] Respondent's protestations to the contrary, Appellant did not conceal anything from Respondent.

Respondent then goes on to claim that Appellant's interpretation of CPLR 204(a) defies the very design and purpose of the statute of limitations as it would impermissibly shorten a plaintiff's time to bring a claim and enforce its rights. However, Respondent ignores that Respondent had already brought its claim twice (in June 2007 and June 2011) and additionally attempts to confuse a time limit on "enforcing its rights" with a time limit on "commencing an action" pursuant to CPLR 204(a).

CPLR 204(a) is quite clear: "Where 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" (emphasis added). CPLR 204(a) is silent as to any time limit on enforcement of rights which would presumably include not only *commencement* of an action, but also *continuation* of an action and in theory could proceed indefinitely. Therefore, Respondent's unsupported and speculative assertion that the intended benefit of *tolling* was to provide Respondent with six years to enforce its rights is without merit, as well as irrelevant since in theory the continuation of an action (enforcement of rights) could proceed indefinitely.

Respondent further argues that Appellant's interpretation of CPLR 204(a) would affect the way all statutes of limitations are calculated in New York. Respondent may very well be correct. However, this does not change the fact that

"[i]n interpreting a statute, the starting point in any analysis must be the plain meaning of the statutory language". *Leader* at 104 (2001)(internal citations omitted).

Pursuant to CPLR 204(a)'s plain meaning the statute's tolling provisions only apply where a claimant has been prevented from *commencing* an action by a court or statutory prohibition. In this case it is clear that the automatic bankruptcy stays never stayed Respondent from *commencing* an action because Respondent had commenced prior actions.

Furthermore, as discussed above, Appellant's interpretation of CPLR 204(a) does not leave a claimant without remedies under the CPLR (CPLR 205 and 306-b). However, claimants proceed at their peril if those remedies are not taken advantage of and ignored.

CONCLUSION

As set forth above and in Appellant's initial brief, because the commencement of the First Foreclosure and the commencement of the Second Foreclosure were not hindered in any way, whatsoever, by the filing of Appellant's First Bankruptcy or the Second Bankruptcy, it is impossible to apply the tolling provision of CPLR 204(a) to the circumstances in this case without defying law, time and logic. Therefore, it is respectfully submitted that this Honorable Court

should reverse the Order of the Supreme Court and the Decision of the Appellate Division.

WHEREFORE, for the reasons set forth above it is respectfully requested that this Honorable Court reverse the Order of the Supreme Court and the Decision of the Appellate Division.

Dated: February 8, 2019
Garden City, New York

_____

Peter K. Kamran, Esq.
Lester & Associates, P.C.
Counsel to the Appellant
600 Old Country Road, Suite 229
Garden City, New York 11530
(516) 357-9191

CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 3,621.

Dated: February 8, 2019

Peter K. Kamran, Esq.
Lester & Associates, P.C.
Counsel to the Appellant
600 Old Country Road, Suite 229
Garden City, New York 11530
(516) 357-9191