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

# Court of Appeals

*of the*

# 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.*

## OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 NYCRR Rule 500.1(f), Defendant-Respondent U.S. Bank National Association, as Trustee for American Home Mortgage Investment Trust 2005-4A, states that U.S. Bank National Association is a wholly owned subsidiary of U.S. Bancorp, a publicly held company, and that no publicly held company owns 10% or more of U.S. Bancorp's stock.

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## PRELIMINARY STATEMENT

Defendant-Respondent U.S. Bank National Association, as Trustee for American Home Mortgage Investment Trust 2005-4A ("Respondent")[1] respectfully submits its brief in opposition to the motion of Plaintiff-Appellant Gregg Lubonty ("Appellant") for leave to appeal to the Court of Appeals the Decision and Order of the Appellate Division, Second Department (the "Second Department"), dated March 28, 2018 (the "Decision"), which unanimously affirmed the dismissal of Appellant's complaint (the "Complaint").

Appellant fails to identify any reason warranting this Court's review of the Decision. Leave to appeal to this Court is reserved for exceptional circumstances that are not present here. Instead, Appellant takes issue with the Second Department's application of well-settled law (that has been consistently applied by each and every Appellate Department) to the undisputed facts of this case. Appellant is merely seeking yet another *de novo* review based on his own unsupported interpretation of a statute that has consistently been applied contrary to Appellant's interpretation. Appellant fails to identify any conflict between the Decision and prior decisions of this Court, point to a conflict among the

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[1] Respondent was sued as U.S. National Association, as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A and American Home Mortgage Investment Trust 2005-4A.

departments of the Appellate Division, or raise any novel questions of public importance.

Specifically, Appellant argues that the Second Department (and the other Appellate Departments) have, for more than half a century, misinterpreted CPLR § 204 by failing to find that a claimant loses the benefit of tolling under CPLR § 204 if it commences an action to enforce its rights before a petition for bankruptcy is filed. However, nothing in the text of CPLR § 204 states that the statute is inapplicable if an action is commenced and each and every Appellate Department has consistently held that CPLR § 204 applies to bankruptcy stays irrespective of whether or not a claimant commences an action. Furthermore, Appellant's interpretation of CPLR § 204 would turn the purpose of the statute of limitations on its head because Appellant's interpretation punishes a claimant that acts promptly, while rewarding the claimant that sits on his/her rights. Because Appellant's motion for leave to appeal fails to raise any novel question of public importance, it should be denied.

## COUNTER-STATEMENT OF THE CASE

On or about August 2, 2005, Appellant executed a note in the principal amount of $2,500,000 (the "Note") for the benefit of American Home Mortgage Acceptance Inc. ("AHMA"). In order to secure payment on the Note, Appellant executed the Mortgage (the Mortgage and the Note shall hereinafter be referred

together as the "Lubonty Loan") encumbering the property known as 286 Montauk Highway, Southampton, New York 11968 (the "Property"). (See App. Br. ¶ 11-12). The Lubonty Loan was pooled and securitized in the American Home Mortgage Investment Trust 2005-4A (the "Trust"). (See App. Br. ¶ 13). The transfer of the Lubonty Loan was made in accordance with the securitization transaction that closed on or about October 7, 2005 and was filed with the Securities and Exchange Commission. Pursuant to the trust agreements, U.S. Bank National Association was the trustee for the Trust and AHMA was the servicer for the Trust, at the time. (See id.)

On June 11, 2007, AHMA—although it had no standing to do so because the Lubonty Loan was already transferred to Respondent—commenced an action to foreclose on the Lubonty Loan styled American Home Mortgage Acceptance, Inc. C/O American Home Mortgage Servicing v Gregg Lubonty, et al., Supreme Court, Suffolk County Index No. 17749/2007 (the "First Foreclosure Action"). (See App. Br. ¶ 15).

On June 26, 2007, Appellant filed a voluntary Chapter 11 bankruptcy petition in the U.S. Bankruptcy Court, Southern District of Florida, Docket No. 07-14945-AJC (the "First Bankruptcy Action"). Appellant's bankruptcy petition listed the Property as one of Appellant's assets. The First Bankruptcy Action was dismissed on November 24, 2009. Accordingly, the First Foreclosure Action was

stayed for two years, four months and 29 days. Notably, the First Bankruptcy Action was voluntarily dismissed by Appellant upon his own motion. (See App. Br. ¶ 16).

On September 27, 2010 the First Foreclosure Action was dismissed as "abandoned" due to AHMA's failure to enter default within one year of the default.

On May 9, 2011, a confirmatory assignment of the Mortgage was executed and recorded in the office of the Clerk of Suffolk County. (See App. Br. ¶ 17).

On June 9, 2011, a foreclosure action styled U.S. Bank National Association as Indenture Trustee for American Home Mortgage Investment Trust 2005-4A v. Gregg Lubonty, et al. Supreme Court, Suffolk County Index No. 18893/2011 was commenced (the "Second Foreclosure Action"). (See App. Br. ¶ 18). On October 19, 2011 Appellant commenced a second bankruptcy by filing a voluntary Chapter 7 petition in the U.S Bankruptcy Court, Eastern District of New York, Docket No. 8-11-77413 (the "Second Bankruptcy Action"). (See App. Br. ¶ 19). The Second Bankruptcy Action once again stayed enforcement of the Mortgage until November 26, 2013, when the bankruptcy trustee released the Property and three other properties (in total the four properties were valued at 7.375 Million Dollars) from Appellant's bankruptcy estate in exchange for a payment of $25,000 from Appellant. (See App. Br. ¶ 19). The bankruptcy trustee released the four

properties reasoning that the liens on the properties were greater than their market value.[2] As such, the Second Foreclosure Action was stayed for two years, one month and seven days.[3] After the stay was lifted, on October 21, 2014, the Second Foreclosure Action was dismissed due to a finding that Appellant was not properly served with process in the Second Foreclosure Action. (See App. Br. ¶ 22).

On November 5, 2014, Appellant commenced this action to quiet title and to vacate and discharge the Lubonty Loan based on Appellant's legal theory that the statute of limitations to enforce the Lubonty Loan had expired. (See App. Br. ¶ 23). Respondent moved to dismiss the Complaint. On August 17, 2015, the Suffolk County Supreme Court (the "Trial Court") issued a detailed five page decision dismissing Appellant's action. (See App. Br. ¶ 25) The Trial Court's Order correctly reasoned that, pursuant to CPLR 204(a), Appellant's two bankruptcies tolled the statute of limitations to foreclose for the time the bankruptcy stays were in place. Appellant moved for reargument before the Trial

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[2] Notably, Plaintiff's current counsel represented him in the Second Bankruptcy Action where the trustee agreed to release the Property for a payment of $25,000 given the belief that the mortgage lien was in excess of the value. A mere two days after receiving his discharge, Plaintiff brought the instant action to vacate the Mortgage which, if successful, would result in a large windfall for Plaintiff despite being allowed to avoid his creditors who were discharged in the Second Bankruptcy Proceeding.

[3] The Second Bankruptcy Action resulted in a discharge on November 3, 2014.

Court and Appellant's motion was denied on July 14, 2016. Appellant also filed an appeal before the Second Department. The Second Department heard oral argument on November 6, 2017. On March 28, 2018, the Second Department issued a decision affirming the Trial Court's order. (See App. Br., Ex. A) Notice of entry of the Second Department's March 28, 2018 decision was duly served and Appellant now brings the instant motion for leave to appeal to this Court.

## ARGUMENT

## POINT I

### APPELLANT FAILS TO PROVIDE ANY COMPELLING JUSTIFICATION FOR THIS COURT'S REVIEW

Leave to appeal to this Court is granted in limited circumstances. *See* Sciolina v. Erie Preserving Co., 151 N.Y. 50, 52 (1896) (explaining that appeals are reserved for "exceptional cases"). Specifically, leave to appeal is granted only where a decision of the Appellate Division either 1) presents an issue that conflicts with a prior decision of this Court; 2) involves a conflict among the departments of the Appellate Division; 3) concerns unsettled law, or 4) poses novel or significant questions of public importance. *See* 22 NYCRR § 500.22(b)(4); 4 N.Y. Jur. 2d Appellate Review § 293 (2018). Appellant has failed to establish—because he cannot—that any of these circumstances are present here.

### A. Appellant Merely Seeks Another *De Novo* Review

Appellant's instant application merely asks this Court to revisit, for the fourth time, his argument that the statute of limitations to enforce the Lubonty Loan was not tolled by CPLR § 204 despite Appellant's multiple bankruptcy petitions. However, this argument has been consistently rejected by every Appellate Department in New York and CPLR § 204 — a statute enacted over half a century ago — has never been applied by any Appellate court in the manner suggested by Appellant. See MLG Capital Assets, LLC v. Judith Eidelkind Trust, 275 A.D.2d 357, 713 N.Y.S.2d 124 (2d Dep't 2000); CDS Recoveries LLC v. Davis, 277 A.D.2d 567, 568, 715 N.Y.S.2d 517, 519 (3d Dep't 2000); Zuckerman v. 234-6 W. 22 St. Corp., 167 Misc. 2d 198, 202-03, 645 N.Y.S.2d 967, 971 (Sup. Ct. N.Y. County 1996), *aff'd*, 267 A.D.2d 130 (1st Dep't 1999); Chase Lincoln First Bank, N.A. v. Dehaan, 89 A.D.3d 1476, 1477 (4th Dep't 2011).

Instead, each and every Appellate Department has held that CPLR § 204 acts to toll a statute of limitations for the time the automatic bankruptcy stay is in effect. Here, the Second Department affirmed the Trial Court's order dismissing Appellant's Complaint by simply applying the well-settled law to the undisputed facts of this case. Despite the well-settled law, Appellant argues that CPLR § 204 has not only been interpreted incorrectly by every Appellate Department since it was enacted, but also that these learned courts have been engaging in

"impermissible judicial legislating" by applying CPLR § 204 to bankruptcy stays where a mortgage foreclosure action preceded the bankruptcy petition. (See App.'s Br. ¶ 37). The problem with Appellant's theory is that the Second Department, in denying Appellant's appeal, merely applied the plain meaning of CPLR § 204 to the facts of the case. Contrary to Appellant's interpretation of the statute, the text of CPLR § 204 does not state the statute is not applicable if a prior mortgage foreclosure action was commenced. Instead, it merely states that if another statute stays the commencement of an action—and there is no dispute that a bankruptcy petition automatically stays commencement of an action—that CPLR § 204 acts to toll the statute of limitations for the time in which the stay is effective. In fact, the Second Department, prior to the decision at issue in this motion, had previously rejected the exact same theory espoused by Appellant on at least two occasions. See PSP-NC, LLC v. Raudkivi, 138 A.D.3d 709, 29 N.Y.S.3d 51 (2d Dep't 2016); see also MLG Capital Assets, LLC v. Judith Eidelkind Trust, 275 A.D.2d 357, 713 N.Y.S.2d 124 (2d Dep't 2000).

The Second Department (and other Department's) rejected Appellant's theory because Appellant's interpretation of CPLR § 204 is not only unsupported by the text of CPLR § 204, but such an interpretation would, if followed, lead to an absurd (and unjust) result. Specifically, it would penalize a claimant who acts swiftly by stripping it of CPLR 204(a)'s benefits, on the one hand, and reward a

claimant who fails to act by providing it with CPLR 204(a)'s extension of the limitations period, on the other. For example, a creditor that acts promptly, like Respondent, would face bankruptcy filings that unfairly truncate the statute of limitations covering its claims.[4] Such a result would have run afoul of the purpose of the statute of limitations which is to encourage claimants to act promptly. *See* Ackerman v. Price Waterhouse, 84 N.Y.2d 535, 542, 620 N.Y.S.2d 318, 321 (1994) ("The policies underlying a Statute of Limitations—fairness to defendant and society's interest in adjudication of viable claims not subject to the vagaries of time and memory...."); see also In re Feinberg's Estate, 18 N.Y.2d 499, 507, 277 N.Y.S.2d 249, 255 (1966) ("The purpose of a Statute of Limitations is to penalize claimants for sleeping on their rights.") Adopting Appellant's interpretation of CPLR § 204 would allow for bankruptcy filings and stays to be employed as a tactic to run out the clock to the detriment of creditors.

Appellant's motion amounts to a plea for *de novo* review, again, which he attempts to justify based on claims of Appellate Division error. On a motion for leave to appeal, however, a claim of error that does not raise any novel issue of law, is not enough to warrant review by this Court. See 4 N.Y. Jur. 2d Appellate

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[4] Based on Appellant's interpretation of CPLR 204(a), Respondent's six-year statute of limitations to enforce its mortgage would have been effectively reduced to one year, seven months, as a result of the two bankruptcy cases Appellant filed.

Review § 294 (2018) (noting that leave to appeal may be denied where "no novel question of law is involved . . ."); see also Wallace v. Dinniny, 12 Misc. 635, 32 N.Y.S. 1150 (C.P. 1895) ("there is no novel question of law involved which would authorize our granting the leave asked to appeal to the court of last resort. . ."); Fulton v. Metropolitan Life Ins. Co., 2 Misc. 55, 20 N.Y.S. 989 (C.P. 1892) ("No sufficient ground is assigned in support of this motion. Reference to the opinions disclosed that no novel question of law was involved in the appeal. . .") Thus, Appellant's motion for leave to appeal should be denied.

**B. Appellant Does Not Establish Any Public Importance**

Despite the well-settled law from the various Appellate Departments, Appellant nevertheless claims that this Court should review the Second Department's decision because it "presents a question of law of general public importance, far reaching consequences, and a question of state-wide interest and application." (*See* App. Br. ¶ 34). However, none of the cases cited by Appellant in support of this proposition are applicable. A summary of the cases cited by Appellant are as follows:

- In Smithtown v. Moore, 11 N.Y.2d 238, 241 (1962) this Court granted leave to appeal to consider a claim by a township that a New York State board, created by a newly enacted statute, used improper metrics to compute the equalization rate for tax assessments of property.

- In In re Shannon B, 70 N.Y.2d 458, 462 (1987) this Court granted leave to appeal in order to consider the question as to whether the appellant's constitutional rights were violated by the New York City Charter's grant of power to New York City police officers to detain suspected truants.
- In Neidle v. Prudential Ins. Co., 299 N.Y. 54 (1949), a decision made merely a few years after the end of World War II, this Court granted leave to appeal to consider the definition of "military engagement" for the purposes of interpreting exclusions in an insurance contract for deaths that occurred during the war.[5]

A plain review of the cases cited by Appelant show that this Court granted leave to appeal in those cases due to important unsettled questions of law brought about by recent developments such as a new statute or the conclusion of a war. It is clear that in those cases there was a need for such questions to be answered because clarifying the law would impact pending or anticipated lawsuits dealing with the same legal issue. Unlike those cases, Appellant's instant motion asks this

[5] Lubonty also cites to People ex rel. Wood v. Graves, 226 A.D. 714 (3d Dep't 1929) but this case is completely irrelevant because in Graves, the application for leave to appeal was made to the Appellate Division Third Department and not to this Court. Thus, the standard applied in Graves hinged upon the local rules of the Third Department and not the rules of this Court. See CPLR § 5602(a).

Court to review and overturn the long standing interpretation of a statute enacted over half a century ago that has been applied consistently among all of the Appellate Departments. Stated another way, Appellant has not set forth any argument, aside from his conclusory belief that all of the Appellate Departments have misinterpreted CPLR § 204 for over half a century, establishing why a review of the long standing case law is of general public importance. In actuality, Appellant's instant appeal has nothing to do with the public. Instead, Appellant filed multiple bankruptcies for the purposes of halting the enforcement of the Lubonty Loan for over four years and he now seeks to shorten the statute of limitations associated with the enforcement of the Lubonty Loan (by dreaming up an interpretation of CPLR § 204 that contradicts the well-settled case law) in an attempt to reap a 2.5 million dollar windfall. The position Appellant finds himself in (which he himself engineered) is clearly not a common occurrence that implicates the public at large. Accordingly, it is respectfully submitted that Appellant has not established the necessary public importance for this Court to grant Appellant's motion for leave to appeal.

## POINT II

## APPELLANT'S MOTION FAILS TO COMPLY WITH CPLR § 5516

The Court of Appeals Rules, 22 NYCRR 500.22 (a), states: " Movant shall file an original and six copies of its papers, unless permitted to proceed pursuant to

subsection 500.21(g), with proof of service of two copies on each other party. The motion shall be noticed for a return date in compliance with CPLR 5516 and subsection 500.21(b) of this Part. CPLR § 5516 states: "A motion for permission to appeal shall be noticed to be heard at a motion day at least eight days and **not more than fifteen days after notice of the motion is served**, unless there is no motion day during that period, in which case at the first motion day thereafter." N.Y. C.P.L.R. § 5516 (2018) (emphasis added). Appellant's motion was served on May 11, 2018 by regular mail. Accordingly, pursuant to CPLR § 5516, the return date for Appellants motion shall not be more than twenty days (five additional days are included for service by mail) after May 11, 2018. Twenty days after May 11, 2018 is May 31, 2018 and the next motion day for the Court of Appeals was June 4, 2018.[6] Instead of noticing the instant motion for a date between May 24, 2018 and June 4, 2018 in accordance with CPLR § 5516, Appellant noticed the instant motion for June 11, 2018. Accordingly, the instant motion is improper for its failure to comply with CPLR § 5516 and 22 NYCRR 500.22 (a) and should be dismissed.

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[6] Return dates for the Court of Appeals are on Monday, even when the Court is not in session. *See* https://www.nycourts.gov/ctapps/civilmotfaq.htm.

## CONCLUSION

For the foregoing reasons, Plaintiff-Appellant Gregg Lubonty's motion for leave to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, Second Department, dated March 28, 2018, which unanimously affirmed the dismissal of Appellant's Complaint, should be denied.

Dated: New York, New York
June 8, 2018

Respectfully submitted,

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