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Pick One: Mariah Carey's All I Want for Christmas, Bruce Springsteen's Santa Claus Is Coming to Town or Chuck Berry's Run Run Rudolph ... Happy Holidays!

December 19, 2024

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Let the Statute of Limitations Run and You Might Be "SOL..."

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HSBC Bank, U.S. v. De Garcia considers the reach of the newly enacted Foreclosure Abuse Prevention Act (FAPA) and its effects on the six-year foreclosure statute of limitations.

Facts:

On July 16, 2009, HSBC commenced a foreclosure action against De Garcia with respect to a residential property located in Astoria, New York (the "2009 Action"). On April 18, 2011, the Supreme Court, Queens County (the "Court") granted HSBC's motion to discontinue the 2009 Action, as HSBC had commenced a second foreclosure action on April 5 of the same year (the "2011 Action"). On May 20, 2015, the parties executed a stipulation discontinuing the 2011 Action. In 2017, approximately eight years after the loan was first accelerated, HSBC brought a third foreclosure action (the "2017 Action") against De Garcia, naming Rosete as a defendant. Rosete had been named as a "Jane Doe" defendant in both the 2009 and 2011 Actions. De Garcia filed an answer, raising that the action was time-barred by the statute of limitations. In May, 2018, HSBC's motion to discontinue the 2017 Action was granted. The current action was filed on August 19, 2022. Rosete served an answer, once again asserting that the action is barred by the statute of limitations and bringing a counterclaim to quiet title under NY RPAPL 1501(4).**[1]**

Under NY RPAPL 1501(4), a person with an interest in real property can seek to cancel and discharge an encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor is not in possession of the real property at the time the action to cancel and discharge the mortgage has commenced.**[2]**

Arguments:

HSBC moved for summary judgment against Rosete, who cross moved for an order granting summary judgment, dismissing the complaint as time barred, cancelling the Notice of Pendency and granting Rosette summary judgment on the counterclaim to cancel and discharge the mortgage.

In opposition, HSBC argued the following:

1. The current action is not time barred because the loan was deaccelerated by the discontinuances in the prior actions and is not covered by CPLR 3217**[3]** contained in Section 8 of the Foreclosure Abuse Prevention Act (FAPA).
   2022. Governor Hochul signed the FAPA in December, 2022. Section 8 amends CPLR 3217 as follows: The voluntary discontinuance of an action may not waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim unless expressly prescribed by statute. **[4]**
2. FAPA does not apply retroactively to undo Rosete's deacceleration of the loan and only applies prospectively to voluntary discontinuances occurring after FAPA's enactment.
3. Retroactive application of FAPA is unconstitutional because FAPA violates HSBC's substantive and procedural due process rights.

Decision:

Under CPLR 213(4), an action to foreclose a mortgage is subject to a six-year statute of limitations. Even if the mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt. It is well settled law that after a lender accelerates a mortgage debt, "[a] lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action."**[5]**

In this case, the Court found that Rosete established her prima facie entitlement to summary judgment dismissing the complaint because the action is time barred. The enactment of FAPA effectively nullified the holding by the Court of Appeals in *Freedom Mtge. Corp. v. Engel*[6] that a voluntary discontinuance of an action constitutes an affirmative act of revocation of the acceleration of the debt. The Court determined *Freedom Mtge. Corp. v. Engel* cannot be applied retroactively, so it is unnecessary to analyze FAPA in relation to HSBC's constitutional claims. Additionally, HSBC failed to submit evidence indicating that after the issuance of the order discontinuing the 2009 Action, that HSBC otherwise revoked the acceleration of the debt by an affirmative act within six years after the 2009 Action was commenced. Thus, the Notice of Lis Pendens filed by HSBC was cancelled against the real property in Astoria, New York.[7]

Takeaways:

This case illustrates the limitations of FAPA and the Court's strong desire to uphold the six-year statute of limitations with regard to affirmative acts of revocation of acceleration of a mortgage. In light of the Court's decision, the prudent lender must affirmatively revoke the acceleration of a mortgage during the six-year statute of limitations period to preserve its foreclosure rights under a mortgage loan.

[1] *HSBC Bank, USA N.A. v. De Garcia*, 84 Misc 3d 1203(A), 2024 NY Slip Op 51349(U) (Sup Ct, Queens County 2024).

[2] New York Consolidated Laws, Real Property Actions and Proceedings Law, § 1501(4).

[3] New York Consolidated Laws, Civil Practice Law and Rules, § 3217.

[4] Foreclosure Abuse Prevention Act, § 8.

[5] *NMNT Realty Corp. v. Knoxville 2012 Trust*, 151 AD3d 1068, 1069-70 (2d Dept. 2017).

[6] *Freedom Mtge. Corp. v. Engel*, 37 NY3d 1 (2021).

[7] *HSBC Bank, U.S. v. De Garcia*, No. 717330/2022, slip op. (N.Y. Sup. Ct. Sep. 23, 2024).

All Along the Watchtower: Awaiting the Ruling on FAPA's Retroactive Reach

December 19, 2024

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In a recent case, *E. Fork Funding LLC v. U.S. Bank, Nat'l Ass'n*, the United States Court of Appeals for the Second Circuit has certified a novel question for the New York Court of Appeals ("NYCOA"): Whether Sections 4 and/or 8 of the Foreclosure Abuse Prevention Act ("FAPA") apply to a unilateral voluntary discontinuance of a mortgage action taken prior to the Act's enactment. In other words, will FAPA apply retroactively to dismiss cases where lenders voluntarily dismissed foreclosure actions in reliance on a resetting of the statute of limitations?

FAPA was enacted in 2022 in response to the NYCOA's decision in *Freedom Mortg. Corp. v. Engel* ("Engel"), a 2021 case in which the court ruled that a voluntary discontinuance of a foreclosure action resets the statute of limitations.**[1]** Specifically, Section 4 and Section 8 of FAPA are at issue in the current case. Section 4 of the Act amended Section 203 of the Civil Practice Law and Rules ("CPLR") to state that, "Once a cause of action upon [a mortgage]...has accrued, no party may...unilaterally...effect a unilateral extension of the limitations period".**[2]** Similarly, Section 8 of FAPA amended Section 3217 of the CPLR to provide that, "...the voluntary discontinuance [of an action on a mortgage]...shall not...toll, extend, revive or reset the limitations period to commence an action".**[3]** *Fork Funding* pertains to a mortgage originated in 2006. The original mortgagors defaulted on the loan in 2010, and the original mortgagee – GMAC Mortgage, LLC ("GMAC") – commenced a foreclosure action. GMAC voluntarily dismissed the action in May of 2011 but subsequently brought a second action for foreclosure in November of 2011. Following an assignment from GMAC to U.S. Bank in 2015, the 2011 foreclosure action was voluntarily discontinued by GMAC in February of 2016. Shortly thereafter, U.S. Bank initiated a third foreclosure action. Due to a separate foreclosure action by the condominium's board of managers, East Fork Funding LLC purchased the subject property in 2016. In 2020, East Fork filed suit to quiet title against U.S. Bank on grounds that Schedule A of the mortgage described a different property than the mortgage was originally filed against. Both U.S. Bank and East Fork filed cross-motions for summary judgment.

While the summary judgment motions were pending in district court, the New York State legislature enacted FAPA. As discussed above, Section 8 of FAPA provides that a voluntary discontinuance of an action on a mortgage will not reset the statute of limitations period.**[4]** Holding that FAPA applied retroactively to the 2010, 2011 or 2016 voluntary dismissals, the district court applied Section 8 of FAPA. Since the statute of limitations began running in 2010 and was not reset by the 2011 or 2016 discontinuances, the district court granted East Fork's motion for summary judgment and denied U.S. Bank's motion for summary judgment.

On appeal, U.S. Bank argued that, as a matter of statutory interpretation, FAPA does not retroactively apply to a voluntary discontinuance. If FAPA does apply retroactively, U.S. Bank asserts that such application would violate the Contracts Clause of the U.S. Constitution. Finally, if FAPA does not apply, then U.S. Bank asserts that the statute of limitations has not run because the 2010 and 2011, foreclosure actions were properly discontinued under *Engel*. East Fork argued the exact opposite. They contend that FAPA does retroactively apply, that its application is not a violation of the Contracts Clause, and that if FAPA does not apply, then the 2010 and 2011 actions were improperly discontinued under *Engel*.

The Court reviewed both parties' arguments but declined to give a ruling on the merits of the case. Instead, the Court states that the NYCOA needs to determine the question because FAPA is a New York State law, its retroactive scope has not previously been addressed by the NYCOA, and the rulings of the state appellate courts are split.

[1] *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, 31 (2021).

[2] NY CPLR § 203(h) (2023).

[3] NY CPLR § 3217(e) (2023).

[4] *See Id*.

Nationwide Injunction Pauses Implementation of the Corporate Transparency Act

December 19, 2024

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On December 3, 2024, the U.S. District Court for the Eastern District of Texas issued a nationwide preliminary **injunction** in *Texas Top Cop Shop, Inc., et al. v. Garland*, enjoining the federal government from enforcing the Corporate Transparency Act ("CTA"), its implementing regulations, and its reporting deadlines, and finding that Congress exceeded its authority in enacting the law.**[1]**

As a result of the decision, reporting companies are not required to comply with the CTA at this time, as the court ordered that "reporting companies need not comply with the CTA's January 1, 2025, [beneficial ownership information] reporting deadline pending further order of the Court."**[2]**

A FinCEN **alert** published after the *Texas Top Cop Shop* injunction states that reporting companies will not be subject to liability if they fail to file a beneficial ownership information report while the preliminary injunction remains in effect. FinCEN also stated that reporting companies may continue to voluntarily submit their reports.

The Department of Justice has appealed. On December 13, 2024, the Department of Justice filed an Emergency Motion for Stay Pending Appeal in the Fifth Circuit.**[3]** The government requested an expedited briefing schedule and a ruling "as soon as possible, but in any event no later than December 27, 2024, to ensure that regulated entities can be made aware of their obligation to comply before January 1, 2025."**[4]** The government's requested briefing schedule could be read to indicate that the government intends to enforce the January 1, 2025 deadline if the stay is granted. Therefore, reporting companies are well-advised to closely monitor developments in the coming days in case the January 1, 2025 deadline for filing is revived. The Fifth Circuit appears to be accommodating the government's request for a December 27, 2024 ruling; briefing on the Emergency Motion for Stay Pending Appeal is scheduled to be complete by December 19, 2024.**[5]**

The constitutionality of the CTA has been challenged in several other courts. The issue is on appeal in a separate case in the 11th Circuit, where a federal district court in Alabama also found the CTA unconstitutional.**[6]** However, in two federal district courts in Virginia and Oregon, courts denied preliminary injunctions after finding that the CTA likely is constitutional.**[7]** FinCEN's recent alert states, "[t]he government continues to believe—consistent with the conclusions of the U.S. District courts for the Eastern District of Virginia and the District of Oregon—that the CTA is constitutional."

Any decision on the merits may take months or longer, and the matter ultimately may be heard by the Supreme Court. It remains to be seen whether the incoming Trump administration will continue the appeal, but the first Trump administration supported the CTA legislation.

A version of this article was originally produced as a Clients & Friends Memo **here**.

[1] *Texas Top Cop Shop, Inc. v. Garland*, No. 4:24-CV-478, 2024 WL 4953814 (E.D. Tex. Dec. 3, 2024).

[2] *Id*. at *37.

[3] Emergency Motion for Stay Pending Appeal, Texas Top Cop Shop, Inc. v. Garland, No. 24-40792 (5th Cir. Dec. 13, 2024), ECF No. 21.

[4] *Id*. at 2.

[5] Court Directive, Texas Top Cop Shop, Inc. v. Garland, No. 24-40792 (5th Cir. Dec. 13, 2024), ECF No. 25.

[6] Notice of Appeal, *Nat'l Small Bus. United v. Yellen*, No. 5:22-CV-1448-LCB (N.D. Ala. Mar. 11, 2024), ECF No. 54.

[7] Notice of Appeal, *Cmty. Associations Inst. v. Yellen*, No. 1:24-CV-1597 (MSN/LRV) (E.D. Va. Nov. 4, 2024), ECF No. 41; Notice of Appeal, Firestone v. Yellen, No. 3:24-CV-1034-SI (D. Or. Nov. 18, 2024), ECF No. 19.

Cadwalader Promotes Sulie Arias to Special Counsel

December 19, 2024

We're thrilled to announced that our colleague, **Sulie Arias**, has been promoted to Special Counsel in Cadwalader's Real Estate practice, effective January 1, 2025.

Sulie, who is based in New York, advises financial institutions on a broad range of real estate finance matters, including the acquisition, financing, refinancing, development and disposition of commercial properties, including office, retail, industrial, multifamily and mixed-use properties, as well as undeveloped land on a local and national basis, and spanning all segments of the marketplace. Her practice includes single-lender and agented, multi-lender construction and permanent loans, bridge loans, mezzanine loans, as well as leverage financing. Sulie earned her B.B.A., *cum laude*, from Bernard M. Baruch College, and her J.D. from St. John’s University School of Law.

Congratulations, Sulie!

Recent Transactions

December 19, 2024

Recent transactional highlights include Cadwalader representing:

- The co-lender in two financings of two industrial/self-storage portfolios totaling $579 million.
- The lenders in a $750 million mortgage loan to refinance a five-star golf and spa retreat in Florida.
- The lenders in a $1 billion single-borrower securitized mortgage loan to refinance 32 student housing properties in 11 states.