

Second Circuit Court of Appeals Holds that Assignee of Federal Agency is Immune from Application of New York Statute of Limitations on Mortgage Foreclosure

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On December 10, 2020, the United States Court of Appeals for the Second Circuit held that an assignee of a mortgage, which was previously assigned to an agency of the federal government, acquires immunity from the application of the New York State statute of limitations on mortgage foreclosures.

In *Windward Bora, LLC v. Wilmington Savings Fund Society*, FSB, 2020 WL 7250869 (2d Cir., Dkt. No. 19-3626), the Second Circuit addressed the issue “whether the federal government’s immunity to state limitations periods is inherited by an assignee of the federal government,” for the first time.

In *Windward*, the plaintiff commenced an action in the federal District Court for the Northern District of New York, to quiet title and discharge a mortgage against residential real property, held by defendant Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, Not in its Individual Capacity as Certificate Trustee for NNPL Trust Series 2012-1 its Successors and Assigns (“Wilmington”). A prior assignee of the mortgage commenced a foreclosure action in 2010. The 2010 action was dismissed in 2016, and the foreclosing plaintiff’s attempts to vacate the dismissal and reopen the case were denied. Between 2014 and 2017, the mortgage was assigned five (5) times. The first of those assignments was to the United States Department of Housing and Urban Development (“HUD”). After four (4) more assignments, the mortgage was ultimately assigned to the defendant, Wilmington.

In *Windward*, the Second Circuit held that “[i]t is well-established that ‘the United States is not bound by a statute of limitations unless Congress has explicitly expressed one,’” and, thus “New York’s six-year limitations period on foreclosure actions does not apply to actions brought by the United States or federal agencies.” *Id.*, at *2 citing *Westnau Land Corp. v. U.S. Small Bus. Admin.*, 1 F.3d 112, 115 (2d Cir. 1993).

The Second Circuit held that federal immunity, applicable to the United States or federal agencies, can be transferred to a non-governmental entity by assignment, holding that “under traditional common law principles governing assignments, ‘the assignee of the United States stands in the shoes of the United States and is entitled to rely on the limitations periods prescribed by federal law.’” *Id.* The Second Circuit reasoned that this result is warranted “because it improves the marketability of instruments held by the United States, thereby giving the United States greater flexibility in monetizing its claims.” *Id.*, citing *UMLIC VP LLC v. Matthias*, 364 F.3d 125, 133 (3d Cir. 2004).

The Plaintiff argued that the assignee should not be entitled to immunity from the statute of limitations because (1) it did not show that the ultimate benefits from a foreclosure of the mortgage would flow to HUD; (2) defendant failed to provide evidence that the *note* was ever assigned to HUD, notwithstanding the undisputed evidence that the *mortgage* was assigned to HUD; and (3) that the defendant failed to prove that the loan was insured by FHA. The Second Circuit rejected these arguments for various reasons. Relevant to the application of the holding of this case in the future, the Court rejected the plaintiff’s third argument, i.e., that the defendant failed to prove that the loan was insured by FHA, holding that the defendant’s inherited immunity is not conditioned on whether the loan was FHA-insured.

One question arising out of *Winward* is whether the case will be binding on New York Courts. While federal case law is persuasive in the absence of state authority to the contrary, it is not binding, except on issues involving a federal question. *Conergics Corp. v. Dearborn Mid-West Conveyor Co.*, 144 A.D.3d 516, 43 N.Y.S.3d 6 (1st Dep't 2016). In *Windward*, the federal question is whether the United States, or an agency of the United States, is immune from state statutes of limitations. The issue addressed by the Second Circuit is whether an assignment of a mortgage from a federal agency to a non-governmental entity conveys with it the federal immunity enjoyed by the assignor. Assignment of a mortgage is governed, generally, by common law, not federal law. Is the Second Circuit's decision in *Windward*, then, a decision on a federal question? The Second Circuit in *Windward* appears to have addressed this, specifically calling the issue of assignee immunity a "federal question", and citing the Third Circuit Court of Appeals' decision in *UMLIC VP LLC* with approval. *Windward* at *3. The Third Circuit in *UMLIC VP LLC* held "federal law supplies the statute of limitations in cases where the plaintiff is successor in interest to the United States." *UMLIC VP LLC*, 364 F.3d at 127. This issue may be litigated in the New York Courts in the future.

The takeaway from *Winward* is that every lender facing a potential statute of limitations issue should check the chain of assignments to determine whether there may be an intervening assignment from a federal agency, making available the assignee immunity argument adopted by Second Circuit.