

## **Appellate Division Interprets RPAPL 1302-a for the First Time in a Decision with Important Implications for Mortgage Servicers**

**By Morgan R. McCord**

On November 25, 2020, the Appellate Division, Second Department interpreted RPAPL 1302-a for the first time, and, fortunately, determined that this new statute does not fundamentally alter the standing defense in residential mortgage foreclosure actions. Standing is, and remains, a non-jurisdictional affirmative defense that must be raised by the defendant to be put at issue in foreclosure litigation. The Appellate Division's decision is a welcome relief to the mortgage servicing industry that anxiously awaited the Appellate Division's interpretation of RPAPL 1302-a.

RPAPL 1302-a was enacted and became effective on December 23, 2019. The statute provides:

Notwithstanding the provisions of [CPLR3211(e)], any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in [RPAPL 1304(6)(a)], shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon defendant's default" (RPAPL 1302-a).

By its plain terms, the statute applies to residential mortgage foreclosures only. In such cases, the statute provides that a defendant's failure to raise standing as a defense in a responsive pleading or in a motion to dismiss does not constitute a waiver pursuant to CPLR 3211(e). The stated purpose of the law is to help assure that issues of standing are resolved on their merits.

Until last week, the Appellate Division had not interpreted this law. [In \*GMAC Mortgage, LLC v. Coombs\*](#), AD 2nd, 2017-08030, the Appellate Division interpreted RPAPL 1302-a for the first time and analyzed its impact on the standing defense in residential mortgage foreclosure actions and on the operation of the waiver provisions of CPLR 3211(e).

The relevant facts are straightforward. The defendant/mortgagor answered the foreclosure complaint, but failed to assert lack of standing as a defense. Nevertheless, the defendant moved to dismiss the complaint on standing grounds. The plaintiff opposed the defendant's motion and separately moved for summary judgment. The Supreme Court denied both motions. The plaintiff moved to reargue and, upon reargument, was granted summary judgment. The Supreme Court found that the defendant had waived standing as a defense by not asserting it in his answer. The defendant appealed.

The Appellate Division began its opinion by reviewing the procedural framework governing responsive pleadings under CPLR 3018. Specifically, the Court highlighted the distinction between denials under CPLR 3018(a) and affirmative defenses under CPLR 3018(b). Denials relate to allegations that must be proven by the plaintiff in order to sustain a cause of action. Affirmative defenses on the other hand must be affirmatively plead by the defendant before the plaintiff has the burden to prove the defense as part of its cause of action.

The Appellate Division next addressed the relationship between affirmative defenses and the waiver provisions of CPLR 3211(e). Generally, affirmative defenses that are not asserted in an answer or in a pre-answer motion to dismiss are

waived. This is not the end of the story, however, as the waiver of certain defenses may be retracted or nullified by a subsequent amendment of the answer to include the waived defenses pursuant to CPLR 3025.

With respect to waiver and retraction, the Appellate Division noted an important distinction between jurisdictional and non-jurisdictional defenses. The waiver of jurisdictional defenses such as a lack of personal jurisdiction cannot be retracted. However, the waiver of non-jurisdictional defenses, i.e. those listed in CPLR 3211(a)(3) and (a)(5), including lack of capacity, arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations and statute of frauds, may be retracted by amendment of the answer to include the waived defense

The Court further noted that there is a third category of defenses listed under CPLR 3211(a)(2), (7) and (10), including lack of subject matter jurisdiction and failure to state a cause of action, which implicate fundamental limitations on a court's power to render an enforceable judgment. These defenses cannot be waived, and may be raised by motion at any time, or in a later amended pleading if permissible.

With this background in place, the Appellate Division analyzed the defense of lack of standing. The Court concluded, based on prior precedent, that standing is a non-jurisdictional affirmative defense, analogous to the defense of lack of capacity, whose waiver may be retracted by subsequent amendment of the answer to include the defense pursuant to CPLR 3025.

The Court next turned its attention to the impact of RPAPL 1302-a on CPLR 3018, holding, based on a plain meaning reading of the statute and its legislative history, that the statute does not disturb settled law. Lack of standing is, and remains, even where RPAPL 1302-a is applicable, a non-jurisdictional defense that must be affirmatively plead to be put in dispute in foreclosure litigation.

Next, the Appellate Division analyzed the impact of RPAPL 1302-a on the waiver provisions of CPLR 3211(e). The Court held that RPAPL 1302-a places standing on an equal footing to the defenses listed in CPLR 3211(a)(2), (7) and (10) that are exempt from waiver and may be raised by motion at any time. Based on this holding, the Court reasoned that standing may, pursuant to the new statute, be raised for first time in opposition to a motion for summary judgment. However, when raised in opposition, the plaintiff is entitled to submit evidence relevant to standing in its reply papers. The Appellate Division further noted that the Supreme Court, in its discretion, may deem the defendant's answer amended to include lack of standing as a defense under these circumstances.

After setting forth these principles, the Appellate Division applied them to the facts of the case, concluding that the Supreme Court should have permitted the defendant to raise lack of standing as an affirmative defense and deemed the defendant's answer amended to include the defense. Nevertheless, the Appellate Division affirmed the Supreme Court's decision finding that the plaintiff submitted sufficient evidence in its reply papers to demonstrate its standing to sue.

Based on the Appellate Divisions decision, mortgage servicers can take a much-needed sigh of relief. RPAPL 1302-a does not fundamentally change the playing field relative to standing. Although the Appellate Division held that standing may be raised for the first time in opposition to a motion for summary judgment, the Court leveled the field by permitting evidence relevant to standing to be submitted in reply. Notwithstanding the foregoing, we recommend that foreclosing plaintiffs submit evidence substantiating their standing with their summary judgment moving papers. Doing so not only helps prevent potential issues from developing down the road, but also may dissuade defendants from challenging standing in opposition.