

## Citimortgage v. Ramirez: Appellate Division, Third Department, Holds Statute of Limitations on Note Suit is Tolloed During Pendency of Foreclosure Action

By Kenneth J. Flickinger

On December 24, 2020, the Appellate Division, Third Department, decided an appeal in the case [Citimortgage, Inc. v. Jose Ramirez, 2020 WL 7647749](#). The Third Department effectively held that an action for a money judgment on a mortgage note is tolled during the pendency of an action to foreclose the mortgage incident thereto. Using the argument adopted by the Third Department in *Ramirez* may provide an avenue of recovery to a mortgagee that may no longer pursue foreclosure based on the expiration of the statute of limitations. A summary of the facts of the case is as follows:

In September 2003, defendant, in exchange for a loan to purchase a residence, executed a note secured by a mortgage on that real property. After defendant failed to make some payments, on May 5, 2010 plaintiff commenced a foreclosure action against defendant, which the Supreme Court dismissed on October 30, 2013 for failure to prosecute. In 2017, plaintiff commenced a second foreclosure action. The Supreme Court dismissed that action as time-barred, as the statute of limitations on the mortgage foreclosure claim began to run on May 5, 2010 – the date the mortgage was accelerated – and expired in May 2016. The court also discharged the mortgage.

In May 2019, plaintiff commenced an action seeking a money judgment against defendant in the amount of the unpaid balance of the note. Defendant moved pre-answer to dismiss the complaint on the grounds that it was barred by, among other things, the doctrine of res judicata and the statute of limitations. The lower court, finding that plaintiff was collaterally estopped from relitigating the issue of whether the statute of limitations period was tolled, granted defendant's motion and dismissed the complaint. The plaintiff appealed. The Appellate Division, Third Department, held as follows:

The question of whether the statute was tolled during the pendency of the first foreclosure action constitutes a purely legal question, and was not barred by the doctrine of collateral estoppel.

The Third Department also held that the doctrine of res judicata did not apply, based on the election of remedies embodied in [Real Property Actions and Proceedings Law \("RPAPL"\) 1301\(3\)](#). The Third Department cited *Gizzi v. Hall*, 309 A.D.2d 1140, 1141 (3d Dep't 2003), stating "[t]he holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies." The Court held that, due to this required election of remedies, plaintiff could not have raised a cause of action to recover on the note in the context of the second foreclosure proceeding. Accordingly, the outcome of that foreclosure proceeding did not have res judicata effect so as to bar the subsequent action to recover on the note.

As to the statute of limitations, while the Court found that defendant met his burden of establishing, prima facie, that the six-year statute of limitations on the 2019 action on the note was expired, the Court found that plaintiff established that the statute of limitations was tolled during the pendency of the first foreclosure action.

Section 204(a) of the Civil Practice Law and Rules (“CPLR”) provides that, “[w]here 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.” RPAPL 1301(3), provides that, while an action for a mortgage debt “is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.”

The Appellate Division, Third Department, drew an analogy between RPAPL 1301(3) and the automatic stay upon the filing of a petition in federal bankruptcy court pursuant to section 362(a) of the Bankruptcy Code. The Third Department held “[s]imilar to the ability to request relief from a stay under the bankruptcy statute, although under RPAPL 1301(3) a creditor may seek leave of court to commence another action to recover a part of a mortgage debt, “the need to seek judicial relief from the ... stay means the creditor is otherwise prohibited from proceeding, and there is no guarantee that the ... court will favorably exercise its discretion.”

In *Ramirez*, the Third Department held that the cause of action for a money judgment on the note was tolled during the pendency of the foreclosure action, to wit, from the time of commencement of the 2010 action, until October 30, 2013, the date the first foreclosure action was dismissed.

This ruling may provide an alternative to a mortgagee that is otherwise restricted from foreclosure by the application of the statute of limitations. There will be other considerations, of course. For example, the homestead exemption pursuant to CPLR § 5206, may limit the total amount a plaintiff can recover from execution of a money judgment against the debtor’s real property (the homestead exemption is currently \$150,000.00 in the five boroughs of New York City, Nassau, Suffolk, Westchester, Putnam, and Rockland Counties). A debtor may also seek to discharge the debt in bankruptcy court (although section 707 of the Bankruptcy Code may prevent a debtor from doing so under certain circumstances that may constitute abuse). Nevertheless, the holding in *Ramirez* may breathe new life into a mortgage debt previously thought to be time-barred, allowing a mortgagee to live to fight another day.