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Financial Services Litigation Update

Court of Appeals Decision Regarding the Saving Statute Pursuant to CPLR 205(a) and the Possible Effect on Mortgage Foreclosure Actions

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In *ACE Securities Corp. v. DB Structured Products, Inc*., 2022 N.Y. Slip Op. 03927, 2022 WL 2162621 (Ct. App.) ("ACE"), the New York Court of Appeals issued a decision affirming the dismissal of an action as time-barred and holding that CPLR 205(a) did not apply to an action by the trustee of a securitized mortgage trust, where a previous timely action was commenced by the certificateholders on behalf of the same trust. Many are concerned that this case may restrict the use of CPLR 205(a) where a foreclosure plaintiff attempts to recommence an action after a non-merits dismissal of a prior case, where the loan has either been assigned to a new entity or a successor trustee has been appointed since commencement of the first action. The following is a brief history of the saving statute codified in CPLR 205(a), a summary of the ACE decision, and an argument why the ACE decision should not restrict the use of CPLR 205(a) in the aforementioned circumstances.

History and Purpose of CPLR 205(a):

CPLR § 205(a), which permits a plaintiff to recommence an action within six (6) months after it has been dismissed, is a remedial statute which has at its core the strong public policy consideration that controversies should be adjudicated on their merits. "Tracing its roots to seventeenth century England, the remedial concept embodied in CPLR 205(a) has existed in New York law since at least 1788." *Reliance Ins. Co. v. PolyVision Corp*., 9 N.Y.3d 52, 56 (2007) (citing *Gaines v. City of New York*, 215 N.Y. 533, 537–538 (1915)); *see Malay v. City of Syracuse*, 25 N.Y.3d 323, 327 (2015)). Saving statutes like CPLR § 205(a) are "an outgrowth of the ancient common-law rule of 'journey's account,'" a period "allowed to permit a party, whose action had abated for matter of form, a reasonable time within which to journey to court to sue out a new writ." *Baker v. Cohn,* 266 A.D. 236, 239 (1st Dep't 1943); see *Doyle v. American Home Products Corp.*, 583 F.3d 167, 171 (2d Cir. 2009).

CPLR § 205(a) and its predecessors were "designed to insure to the diligent suitor the right to a hearing in court (until he or she) reaches a judgment on the merits." *Gaines*, 215 N.Y. at 539; *see Malay*, 25 N.Y.3d at 327. The "core purpose" of the statute is to provide "a genuine bite at the apple" (*Matter of Winston v. Freshwater Wetlands Appeals Bd*., 224 A.D.2d 160, 164 (2d Dep't 1996)), by "remedying what might otherwise be the harsh consequence of applying a limitations period where the defending party has had timely notice of the action." *Matter of Goldstein v. New York State Urban Dev. Corp*., 13 N.Y.3d 511, 521 (2009); *see Malay*, 25 N.Y.3d at 327. In other words, CPLR § 205(a) provides "a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim." *George v. Mt. Sinai Hosp*., 47 N.Y.2d 170, 178–179 (1979); *see Carrick v. Central Gen. Hosp*., 51 N.Y.2d 242, 245–246, 249–253 (1980); *Matter of Morris Invs. v. Commissioner of Fin. of City of N.Y*., 121 A.D.2d 221, 225 (1st Dep't 1986) (*affd* 69 N.Y.2d 933 (1986)); *Ivory v. Ekstrom*, 98 A.D.2d 763, 764 (2d Dep't 1983); *Doyle v. American Home Products Corp*., 583 F.3d at 171.

The Court of Appeals previously reaffirmed that the statute's "'broad and liberal purpose is not to be frittered away by any narrow construction'." *Malay*, 25 N.Y.3d at 327 (quoting *Gaines*, 215 N.Y. at 539).

Summary of the Facts in ACE:

Defendant DB Structured Products, Inc. ("DB") purchased approximately $500 Million Dollars-worth of mortgage loans and sold them to an affiliate, ACE Securities Corp., pursuant to a Mortgage Loan Purchase Agreement. ACE Securities then deposited the loans into a trust, and the loans served as collateral for certificates issued by the trust—which in turn pay principal and interest to certificateholders based on the funds generated by the underlying mortgages. Pursuant to a pooling and servicing agreement (PSA), ACE Securities transferred to HSBC as trustee all of its rights in the trust and arising under the MLPA.

In January 2012, two certificateholders—independent investment funds holding 25% of the trust's voting certificates—notified HSBC of breaches allegedly uncovered through a forensic review of the pooled loans, which would allow the trust to seek recourse against DB. The certificateholders demanded that HSBC pursue repurchase of the entire pool by DB and urged HSBC to seek a tolling agreement in light of the impending expiration of the statute of limitations. HSBC did neither. Consequently, the two certificateholders—on behalf of the trust—attempted to commence an action against DB through the filing of a summons and notice in March 2012, exactly six years from the closing date, alleging breach of the representations and warranties and naming HSBC as a nominal defendant. Six months later, following DB's demand for a complaint, HSBC filed a complaint on behalf of the trust, purporting to substitute as plaintiff for the certificateholders.

DB moved to dismiss the complaint, arguing that the HSBC complaint was time-barred, that the certificateholders failed to comply with a contractual condition precedent by failing to provide DB with the requisite pre-suit notice and opportunity for cure and repurchase, and that the certificateholders lacked standing to sue. The motion to dismiss was granted, and the Court of Appeals affirmed, holding that the HSBC complaint was untimely, and the certificateholders failed to comply with a contractual condition precedent.

HSBC then commenced a new action seeking to "revive" the certificateholders' action pursuant to CPLR 205(a). HSBC asserted that the certificateholders' action was timely commenced and based on the same transaction, and that it had been dismissed less than six months before on grounds that did not preclude CPLR 205(a) relief. Thus, HSBC contended that CPLR 205(a) authorized commencement of the present action, which would otherwise be barred by the statute of limitations. DB moved to dismiss the second HSBC action arguing that it was time-barred, and that CPLR 205(a) did not apply because HSBC was not the same "plaintiff" as the certificateholders. HSBC argued that, while HSBC is not the same entity as the certificateholders in the previous action, the second action may nevertheless be deemed timely under CPLR 205(a) because HSBC, as trustee, was only "nominally" different from the plaintiffs in the original action insofar as it sought to enforce the "same rights" as the certificateholders—namely, those of the trust itself.

On June 16, 2022, the Court of Appeals affirmed the dismissal of the second HSBC action as time-barred, holding that CPLR 205(a) did not apply because HSBC was a different "plaintiff" from the certificateholders in the previous action. In doing so, the Court of Appeals appears to have narrowed the application of CPLR 205(a).

The Court of Appeals Holding:

The majority decision of the Court of Appeals held:

> We have long recognized that "the benefit provided by [CPLR 205(a)] is *explicitly*, and *exclusively*, bestowed on 'the plaintiff' who prosecuted the initial action" except in the limited scenario where "the plaintiff" dies, the cause of action survives, and an administrator or executor of the deceased plaintiff's estate seeks to commence a new action based on the same occurrence (*Reliance*, 9 N.Y.3d at 57, 845 N.Y.S.2d 212, 876 N.E.2d 898 [emphasis added]). That is, the savings statute "applies only where the second action is brought by the same plaintiff" or an estate representative

> Construing the term "the plaintiff" in CPLR 205(a) to authorize commencement of a new action by any entity seeking to pursue the "same rights" as the prior plaintiff—as HSBC urges us to do—would render the statutory language permitting commencement of new actions by administrators and executors superfluous. An estate representative raising a claim on behalf of a deceased plaintiff is generally, as a matter of course, seeking to vindicate the rights of the original and now-deceased plaintiff. Had the legislature intended the statutory reference to "the plaintiff" to impliedly and broadly allow any entity seeking to vindicate the "same rights" as the original plaintiff or any entity claiming to represent the same "real party in interest" to benefit from CPLR 205(a), there would be no need for the statute to specifically bestow such benefit on executors and administrators. Yet, for over a century (*see* Code of Civil Procedure § 405 [1895]), an entity different than the original plaintiff has been permitted to rely on the savings statute to commence a subsequent action only in the circumscribed context of a deceased plaintiff's estate.
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> Where, as here, the legislature has created one statutory exception—executors and administrators—to the general rule that the second action must be commenced by the original plaintiff, we must infer that the legislature did not intend CPLR 205(a) to broadly apply to any party that seeks to vindicate the same rights. When the legislature intends to extend benefits to other entities that may have interests similar or identical to those of a plaintiff or defendant it has typically said so (*see e.g*. CPLR 203[b], [c] ["united in interest"]; 205[b] ["successor in interest"]; 1021 ["successors or representatives"]; 3020[d] ["parties united in interest"]; 3117[c] ["representatives or successors in interest"]). The absence of any language in CPLR 205(a) extending its reach beyond the original plaintiff or an estate representative, coupled with the precise recognition of a single exception, must be considered "meaningful and intentional as ... the failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended" (*Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce,* 21 N.Y.3d 55, 60, 967 N.Y.S.2d 876, 990 N.E.2d 114 [2013]).

The majority went on to state:

> HSBC is admittedly a different entity than the certificateholder plaintiffs. HSBC is neither an administrator or executor for the original plaintiffs, nor can we fairly say that HSBC is the certificateholders just in a "different capacity" (*id*.). To be sure, both actions were purportedly brought "on behalf of the [t]rust" and any recovery from either would ultimately inure to the benefit of all trust certificateholders. However, the PSA authorizes HSBC, as trustee, to enforce the MLPA and the repurchase protocol. In the instant action, HSBC "is seeking to enforce its own, separate rights" as trustee, "rather than the rights of the [certificateholder] plaintiffs in the original action" (*id*. at 57, 845 N.Y.S.2d 212, 876 N.E.2d 898)—entities that have a limited right to enforce the governing agreements, to the extent the PSA permits them to do so at all; indeed, HSBC now concedes that the certificateholders lacked standing under the relevant contracts to bring the prior action on behalf of the trust. Nor are HSBC and the certificateholders' interests entirely aligned (*see Streeter*, 263 N.Y. at 44, 188 N.E. 150), as evidenced by the requirement that the certificateholders offer HSBC indemnity for legal action taken at their behest.

In closing, the majority held that "[w]here, as here, the litigant commencing the second action is not the original plaintiff, application of CPLR 205(a) would protect the rights of a *dilatory*—not a diligent—suitor. By failing to bring the action within the statute of limitations, HSBC signaled that it had no intention to pursue its claims in court. CPLR 205(a) does not apply and HSBC's failure to commence an action within the statute of limitations is fatal."

Discussion and Potential Application in Foreclosure Cases:

The majority's strong language limiting the application of CPLR 205(a) to a new action commenced by the "original plaintiff" or the administrator or executor of the deceased plaintiff's estate has caused concern among many

practitioners that the decision in *ACE* could restrict the use of CPLR 205(a) in the context of a mortgage foreclosure action.

In a mortgage foreclosure action, where the note and mortgage are assigned to a new entity, or a successor trustee is appointed for a securitized mortgage trust plaintiff after commencement of foreclosure, does the Court of Appeals' decision in *ACE* preclude the recommencement of the action pursuant to CPLR 205(a) following a non-merits dismissal? The answer should be no. *ACE* should not restrict the use of CPLR 205(a) in these scenarios, and there is enough in the majority decision in *ACE* to support the argument.

The primary distinction is that in *ACE*, HSBC as trustee could have enforced the rights of the trust by timely commencing an action against DB in the first instance. In the foreclosure examples above, the different entity commencing the second action pursuant to CPLR 205(a) would not have had the right, or authority, to commence the first action, and the "original plaintiff" would not have the right, or authority, to commence the second action. This is a significant distinction, and one that should create a different result than that reached in *ACE*.

In *ACE*, the Court of Appeals found that HSBC as trustee was the only party that had the right to sue in the first instance (which appears to have been admitted by HSBC). The majority decision in *ACE* held that the trust and the trustee are different parties, with different rights; that HSBC admitted the certificateholders lacked standing to sue in the first action; that HSBC was the party that should have sued in the first instance; and that it is undisputed that HSBC did not timely commence the action.

The situation is different where an assignee or successor trustee in a foreclosure action commences the second action utilizing CPLR 205(a). The named plaintiff may be different in the second action, but the named plaintiff in the first action no longer has the legal right or authority to recommence the new action. It would make no logical sense for the assignee or successor trustee to be denied the opportunity to assert the same cause of action simply because the mortgage was sold or transferred, or a successor trustee was appointed since the commencement of the first action. To do so would be contrary to the underlying purpose of CPLR 205(a), as set forth above.

The dissent in *ACE* raises some other examples illustrating the potential dangers of the majority's holding, including where a plaintiff commenced a timely action, later became incapacitated, and a guardian ad litem has been appointed for the plaintiff, or where a guardian ad litem commenced an action on behalf of a minor, and the minor subsequently reached the age of majority. The majority holding in *ACE* should not preclude the guardian ad litem from recommencing an action within six months of a non-merits dismissal in the first scenario, or preclude the former minor from recommencing an action in their own name in the second scenario. In these examples, similar to the foreclosure examples, the "original plaintiff" no longer has the right or authority to recommence the action, but the cause of action and the underlying right to be enforced has not abated. These are not situations in which the wrong party was named as the plaintiff in the first instance, which makes these situations factually distinguishable from the decision in ACE. Whether courts deciding these issues will agree remains to be seen, but there is ample support for the argument in the majority decision in *ACE*.

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