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Reporting on
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CASE LAW DEVELOPMENTS

Majority of Court of Appeals Rules That Sole Remedy Provision Required Pre-Suit Notice of Each Non-Conforming Loan Court Refuses to Apply Relation Back Doctrine

We have reported in the past on litigation involving residential mortgage-backed securities (RMBS). See, for example, *Accrual of Statute of Limitations for Breach of Representations and Warranties Under CPLR 213*, in the August, 2015 edition of the *Law Digest*. More recently, in *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.*, 2022 N.Y. Slip Op. 01866 (March 17, 2022), the Court of Appeals was again asked to rule on a statute of limitation issue in the RMBS arena. U.S. Bank National Association ("U.S. Bank") is the trustee of a RMBS trust. D.L.J. Mortgage Cap. ("DLJ") is the sponsor of that trust. The trust was established pursuant to a pooling and service agreement ("PSA"), which included certain representations and warranties regarding the mortgage loans that comprised the trust. The PSA also included a "sole remedy" provision which granted the trustee limited authority to seek a remedy for a breach of any of the representations or warranties. That remedy was the "repurchase protocol," which required the sponsor to cure, repurchase, or provide a substitute for any non-conforming loan within 90 days of notice of (or independent discovery of) a breaching loan.

In 2011, a conservator for Freddie Mac sent two letters to the trustee identifying 304 loans that breached DLJ's representations and warranties. The conservator asked the trustee to enforce DLJ's obligation and institute the repurchase protocol. The trustee forwarded the two letters to DLJ and followed up with a second letter identifying 900 additional loans that were in breach. In both cases, the trustee invoked the repurchase protocol. The trustee then brought this action against DLJ, demanding the repurchase of the identified 1,204 loans that were allegedly in breach and "all other Mortgage Loans as to which DLJ breached representations

and warranties." As discovery continued, the trustee's expert found 480 additional breaching loans that had not been identified in the pre-suit letters.

DLJ moved for partial summary judgment alleging, among other things, that recovery could not be pursued as to the 480 loans not identified in the pre-suit letters. The trial court denied the motion, finding that the pre-suit letters fulfilled the contractual obligations and, regardless, the later identified claims related back. The Appellate Division affirmed, finding that the initial pre-suit letter timely informed the defendant of a substantial number of breached loans and that "the pool of loans remained under scrutiny, with the possibility that additional non-conforming loans might be identified." Thus, the subsequent additional 480 loans related back to the initial notice.

In a 6-1 decision, the Court of Appeals reversed, finding that the plain language of the sole remedy provision required that specific notice be given of *each non-conforming loan* prior to bringing suit. Moreover, the "relation back doctrine" of CPLR 203(f) was not available to cure plaintiff's failure to provide this notice.

The Court noted that the case presented an issue of contract interpretation and it has repeatedly enforced these types of sole remedy provisions "in accordance with their plain terms." Turning to the sole remedy provision here, the Court focused on the singular nature of the language (e.g., "*any* Mortgage Loan"; "such breach"; "such Mortgage Loan"), concluding that loan-specific notice was required, not mere allegations of pervasive breach. Moreover,

the sole measure of recovery for a nonconforming loan—i.e., the "repurchase price"—is also loan specific, depending on the outstanding balance of that particular loan. This language makes DLJ's obligation to cure, repurchase, or substitute a loan contingent—as relevant here—upon notification and allegation of breach as to an individually identified loan. Indeed, this is the only sensible reading of the repurchase protocol. The trust here contains over 5,000 mortgage loans and, in order for DLJ to cure, repurchase, or sub-

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stitute a claimed nonconforming loan or loans, it must know which loans are alleged to be in material breach of the representations and warranties.

Id. at *13.

The Court emphasized that the purpose of prompt notice was not only to inform DLJ of a breach, but also to trigger the sole remedy provision obligating it to cure, substitute, or repurchase a “particular” loan or loans within 90 days. The Court rejected the argument that post-suit disclosure was sufficient because the PSA did not require pre-suit notice:

The repurchase protocol sets forth the mechanism that—upon prompt notice to DLJ of an allegedly nonconforming loan, a repurchase demand, and an opportunity to cure—is the negotiated “sole remedy” for any nonconforming loans included in the trust in breach of DLJ’s representations and warranties. As such, it necessarily follows that no action may be validly commenced to recover in connection with a particular loan until the repurchase protocol has been invoked with respect to that loan, the cure period has expired, and DLJ has failed to adhere to the contractually agreed-upon remedy for the breach.

Id. at *16–17.

The Court similarly rejected the notion that CPLR 203(f), the relation back doctrine, applied. That section provides that a claim in an amended pleading can relate back to a timely and validly filed complaint where the original complaint provides “notice of the transactions, occurrences, or series of transaction or occurrences,” upon which the new claim is based. First, the Court stated that the trustee did not seek to invoke the doctrine after it filed an amended complaint adding new claims. Instead, the trustee merely identified the loans in an amended reply expert report. Moreover, CPLR 203(f) did not apply

to excuse the trustee’s failure to comply with the contractual prerequisite to suit. The parties agreed to a limited remedy for the inclusion of nonconforming loans in the trust and made that remedy available only if the trustee first complied with certain loan-specific notice requirements, providing the sponsor an opportunity to cure or repurchase the identified loans. “Express conditions must be literally performed; substantial performance will not suffice.” We cannot rewrite the contract by substituting a different, post-suit notice procedure in place of the one chosen by the parties (citation omitted).

Id. at *20.

In dissent, Judge Rivera maintained that the notice provided by the trustee expressly stated that it was not limited to the loans identified at the time, which “was all the notice DLJ was entitled to under the RMBS agreement.” She insisted that the majority’s position concerning individual loan notice had no textual support; nothing in the PSA foreclosed the trustee from providing notice of specific loans—here 20% of the loan pool—as examples of a widespread failure; and the use of the singular form “loan” in the PSA’s repurchase agreement was not “dispositive of the drafters’ intent for loan-specific notice.”

With respect to the relation back doctrine, the dissent emphasized that the state version was more liberal than its fed-

eral counterpart, in that the “CPLR requires only ‘notice’ of the transactions or occurrences (or series of transactions or occurrences), and not that the claim ‘arose out of’ the same conduct, transaction or occurrence, as its federal counterpart mandates.” *Id.* at *40. Here, the complaint and pre-suit letters put DLJ on notice of systemic breaches throughout the loan pool, putting defendant on notice that other loans might be in breach. Each loan was not a separate transaction. The loans were part of the same loan pool and a faulty securitization process infected the entire trust. Thus, CPLR 203(f) applied. The dissent concluded that the majority’s interpretation would allow the defendant to be shielded from remedying hundreds of noncompliant loans.

In the interest of full disclosure, I submitted an amicus curiae in this matter.

Majority of Court Holds That Two-Hour Rule Authorizing Chemical Test Does Not Apply to DMV Revocation Hearing

Finds Rule is Evidentiary One, Not a Grant of Substantive Rights

Matter of Endara-Caicedo v. Vehicles, 2022 N.Y. Slip Op. 00959 (February 15, 2022), dealt with Vehicle and Traffic Law (VTL) §1194(2)(a)(1), permitting a chemical test of a motorist based upon deemed consent within two hours of arrest. The issue was whether the two-hour component of the rule applied to a Department of Motor Vehicle (DMV) license revocation hearing. A majority of the Court of Appeals said that it did not.

Approximately *three hours* after the petitioner had been arrested for driving while intoxicated, he was warned that if he refused to submit to a chemical test there would be license revocation consequences. As the majority insisted (see below), the relevant statute provides that a DMV license revocation hearing is limited to four issues:

- (1) whether the police had reasonable grounds to believe the motorist was driving in violation of Vehicle and Traffic Law § 1192;
- (2) whether the arrest was lawful;
- (3) whether the motorist was sufficiently warned, prior to the refusal, in clear and unequivocal language, that a refusal to submit to the chemical test referenced in Vehicle and Traffic Law § 1194 (2)(a)(1) would result in the immediate suspension and subsequent revocation of his or her driver’s license, independent of whether the motorist is found guilty of the charge for which he or she was arrested; and
- (4) whether the motorist refused “to submit to such chemical test or any portion thereof” (Vehicle and Traffic Law § 1194 [2] [c]).

Id. at *2.

The Administrative Law Judge revoked the petitioner’s driver’s license based on his refusal to submit to the chemical test, and the DMV Appeals Board affirmed. The petitioner brought this Article 78 proceeding to annul the determination, but the trial court denied the petition and dismissed the proceeding. The Appellate Division affirmed, holding that the petitioner’s refusal to take the chemical test could be used in the license revocation hearing even though the refusal occurred more than two hours after the arrest.

A majority of the Court of Appeals affirmed, finding that the ALJ was limited to the four issues noted above and that there was no requirement that the ALJ find that the refusal

On Certified Questions, Court of Appeals Rules That Collective Bargaining Agreements Did Not Provide for a Vested Right to Have Contribution Rates Remain Unchanged Court Refuses to Adopt Any Inferences

In 2011, via an amended statute and regulation, New York State reduced its rate of contribution to certain retired former employees' health insurance premiums. The Civil Service Employees Association (CSEA), the union that represented the largest bargaining unit of New York State employees, and its president and retired former CSEA members, commenced an action in federal court. They argued that the State's contribution rate reduction breached its obligations under past collective bargaining agreements (CBAs) with the State to pay a fixed percentage of the retirees' health insurance premiums throughout their retirements. Additional unions and retirees similarly filed suit.

The District Court granted the State's summary judgment motion, concluding that "the unambiguous terms of the CBAs at issue did not create a vested interest in the perpetual continuation of premium contribution rates at a specific level." *Donohue v. Cuomo*, 2022 N.Y. Slip Op. 00910 (February 10, 2022) at *7. The Second Circuit reserved decision and certified two questions:

"Under New York state law . . . do [the various relevant provisions] singly or in combination, (1) create a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lifetimes, notwithstanding the duration of the CBA, or (2) if they do not, create sufficient ambiguity on that issue to permit the consideration of extrinsic evidence as to whether they create such a vested right? . . .

"If the CBA, on its face, or as interpreted at trial upon consideration of extrinsic evidence, creates a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lives, notwithstanding the duration of the CBA, does New York's statutory and regulatory reduction of its contribution rates for retirees' premiums negate such a vested right so as to preclude a remedy under state law for breach of contract?"

Id. at *9.

The Court of Appeals referred to New York contract interpretation principles, noting that extrinsic or parol evidence is only admissible where a court finds an ambiguity in the contract. In *Kolbe v. Tibbetts*, 22 N.Y.3d 344 (2013), the Court held that the relevant provisions there "unambiguously established" that the plaintiffs had a vested right to particular coverage. However, it left open the question as to whether a New York court can *infer* vesting of retiree health insurance rights when construing a CBA.

In *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015), and *CNH Industrial N.V. v. Reese*, 138 S. Ct. 761 (2018), the United States Supreme Court rejected such inferences as being incompatible with ordinary contract principles under federal law, repudiating *International Union v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir 1983), *cert denied*, 104 S. Ct. 1002 (1984) and its progeny ("Yard-Man").

to submit to the test happened within two hours of the arrest. The Court looked to the statutory framework, noting that "the mandatory administrative revocation hearing for a motorist's refusal to submit to a chemical test evolved independently and subsequently to the two-hour evidentiary rule relating to the admissibility of blood alcohol content (BAC) for criminal prosecutions of driving while intoxicated (DWI) committed in violation of Vehicle and Traffic Law §1192." *Id.* at*5. Thus, the two-hour rule is an evidentiary one concerned with the probative value of BAC evidence used in a criminal prosecution. It is not a grant of a substantive right to a defendant with respect to the taking of or the refusal to take a chemical test.

The majority found that its past authority relied upon by the dissent, *People v. Odum*, 31 N.Y.3d 344 (2018), was not controlling and involved a different issue:

Odum addressed the admissibility at trial of the results of a chemical test administered more than two hours after the defendant's arrest, and whether the refusal warnings, including the inaccurate warning regarding the use of any refusal at a criminal trial, as given to him rendered his consent to the test involuntary. . . . The legislative decision in 1941 to create a two-hour evidentiary rule was rooted in the existing science surrounding how fast alcohol metabolized in the bloodstream and the probative value of that evidence after two hours had passed. The administrative penalty of a license revocation does not implicate these evidentiary concerns (citations omitted).

Id. at *9–11.

In addition, the Court was not moved by prior DMV long-standing policy that the two-hour rule applied to license revocation hearings. Initially, the Court is "not required to defer to an agency's interpretation of plain statutory language and legislative intent." Moreover, the DMV itself abandoned that interpretation 10 years ago in response to a Court of Appeals decision.

The dissent focused on the statutory language, concluding that

[t]here is no dispute that the chemical test authorized in VTL § 1194 (2) (a) is the same chemical test cross-referenced later, in paragraphs (c) and (f) concerning, respectively, administrative hearings and criminal proceedings. In *People v Odum*, we concluded that the phrase "such chemical test" in section 1194 (2) (f) necessarily referred to the chemical test in section 1194 (2) (a), which is subject to the two-hour limitation. There is no textual basis for concluding that the exact same language means something different in these two paragraphs. The courts of this state and the Department of Motor Vehicles (DMV)—the legislatively appointed regulatory agency charged with the proper application of the VTL—have, for decades, concluded the same (citation omitted).

Id. at *14.

The dissent stressed that the statutory framework and text distinguish between three categories of tests, with only one having a two-hour limitation. Moreover, the text uses the phrase "such chemical test" throughout § 1194(2) to mean only the last referenced chemical test, which must be requested within two hours of the arrest.

Here, in *Donohue*, the Court of Appeals agreed with the Second Circuit that the applicable 2007-2011 CBAs did “not expressly provide for a vested right to coverage at fixed contribution rates.” 2022 N.Y. Slip Op. 00910 at *20. Moreover, it refused to adopt any inferences, concluding that *Yard-Man*-type inferences “either in favor of vested rights or in favor of determining that ambiguity exists concerning that issue” were inconsistent with *New York’s* contract interpretation principles, which focus

on the parties’ chosen language, by injecting considerations untethered to the words that the parties included in their agreement. . . . Inferences akin to those applied in *Yard-Man* are inconsistent with *New York’s* ordinary contract principles because they “plac[e] a thumb on the scale in favor of vested retiree benefits.” Instead of adopting such inferences based on policy considerations grounded in employment matters, or any other considerations, existing outside the four corners of the CBA, we adhere to our contract principles which preclude a *New York* court from “disregard[ing] the precise terminology that the parties used” (citations omitted).

Id. at *20–21.

Because the Court concluded that the CBAs did not expressly provide for vested contribution rates and, as discussed above, it refused to adopt any inferences, it did not answer whether the CBA was ambiguous or address the second certified question.

Presenting a Proposed Ex Parte Order to Show Cause Which is Rejected by the Court Nevertheless Qualifies as the Taking of Proceedings Under CPLR 3215(c) Thus, Dismissal Would Be Inappropriate

CPLR 3215(c) provides that where a plaintiff “fails to take proceedings for the entry of judgment within one year after the default,” the court is to dismiss the complaint as abandoned “unless sufficient cause is shown why the complaint should not be dismissed.” There is a steady stream of reported cases dealing with this provision. See e.g., *Weinstein, Korn & Miller, New York Civil Practice: CPLR* ¶ 3215.14 (David L. Ferstendig, ed., 2022).

Significantly, CPLR 3215(c) does not require that a judgment be entered within the one-year period, only that the plaintiff “take proceedings” within the one-year period. Many cases talk in terms of the plaintiff taking a “preliminary step.” See, e.g., *Bank of Am., N.A. v. Lucido*, 163 A.D.3d 614, 614 (2d Dep’t 2018).

It has been held that the plaintiff took such a preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference. *Id.* But what happens if the plaintiff presents a proposed ex parte order to show cause for an order of reference, but the court rejects the document for defects inherent in the papers? Would that qualify as the “taking” of proceedings so as to avoid a CPLR 3215(c) dismissal? A narrow majority of the Second Department in *Citibank, N.A. v. Kerszko*, 203 A.D.3d 42 (2d Dep’t 2022), answered that question in the affirmative, reasoning that

[t]he term “take proceedings” is unique to CPLR 3215(c), as it is not found in any other provision of the CPLR. If the state legislature had intended for the taking of proceedings to strictly require the “filing” or the “service” of a motion or order to show cause, it could have easily and cleanly written such language into the statute, but did not do so. Indeed, it would have made no sense for the legislature to define the taking of proceedings as the “service” of a motion (see CPLR 2211), as motions for leave to enter a default judgment in residential mortgage foreclosure actions pursuant to RPAPL 1321(1) may be made ex parte. Similarly, if the state legislature had intended to restrict “taking proceedings” to formal motion practice only, it could have said so as well. To “take proceedings” is a broader and more encompassing concept than a more tightly defined “filing” or “service” of a motion for leave to enter a default judgment or other type of motion (citation omitted).

Id. at *13.

The court found here that by merely presenting the proposed order to show cause to the trial court within the one-year period, the plaintiff had established the requisite intent not to abandon the action. The trial court’s rejection of the order was “beside the point . . . What matters is the intent manifested by the presentment of an application, not what specific form it took or how it was filed.” *Id.* at *15.

Preservation of Argument for Appeal

In *Kerszko*, the plaintiff had argued that the trial court erred in directing that the complaint be dismissed for reasons unrelated to those specifically set forth in the motion papers. The question was whether such an issue was preserved and appealable. The Second Department looked back at its prior decisions in *Tirado v. Miller*, 75 A.D.3d 153 (2d Dep’t 2010), and *Rosenblatt v. St. George Health & Racquetball Assoc. v. LLC*, 119 A.D.3d 45 (2014), for direction, concluding that the trial court’s sua sponte analysis and reasoning in the order,

self-preserved the issues for appellate review because it was pursuant to the same CPLR section within which the plaintiff’s motion was based and was dispositive to the action. In both actions, the sua sponte reasoning of the court was recognized and addressed by this Court on the merits. Due to the dispositive import of the motion, *Rosenblatt* is controlling to this appeal. It is only where a court acts wholly outside the parameters of the CPLR basis of a noticed motion, unlike here, where a sua sponte order or ruling is not subject to appeal as of right. CPLR 5701(a)(2)(v) specifically confers upon parties the right to appeal from orders arising from noticed motions that affect a substantial right. Here, the plaintiff’s noticed motion directly implicated CPLR 3215 which the plaintiff actually argued in its papers, and resulted in an appealable order, as that order affected the most substantial right of all—the dismissal of its complaint (citation omitted).

Kerszko, 203 A.D.3d 42, at *8–9.

While Justice Dillon, who wrote the majority opinion, believed that leave to appeal the order was unnecessary, because one of the concurring judges did, “we are constrained to grant leave to address the merits of the appeal.” The Second Department had more to say, but we ran out of space. We hope to circle back in a future edition.