New York State Law Digest

EDITOR: DAVID L. FERSTENDIG

No. 740 July 2022

Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

NYSBA

CASE LAW DEVELOPMENTS

CPLR 205(a) Cannot Be Used to Save Action Brought by a Different Plaintiff

Court of Appeals Finds Trustee Was Enforcing Its Own Separate Rights in the Second Action

On numerous occasions, we have dealt with CPLR 205(a), which provides that if an action is timely commenced and terminated in a manner other than those enumerated in the statute, the plaintiff can bring a second action after the statute of limitations has run based on the same transactions or occurrences within six months after termination of the first action. Generally, for CPLR 205(a) to apply the "plaintiffs" in both actions must be the same. *See Reliance Ins. Co. v. Polyvision Corp.*, 9 N.Y.3d 52, 57 (2007) (CPLR 205(a) does not apply to allow corporation to file second action where first action was commenced in the name of a different related corporate entity, but was subsequently dismissed for naming the wrong plaintiff.) We have also reported in the past on litigation involving residential mortgage-based securities (RMBS), and instances in which the Court of Appeals has ruled on statute of limitations issues in this area (most recently in the April 2022 edition of the *Digest* with respect to CPLR 203(f)).

In *ACE Sec. Corp. v. DB Structural Prods., Inc.,* 2022 N.Y. Slip Op. 03927 (June 16, 2022), the Court of Appeals was confronted again with a statute of limitations issue in the RMBS arena, this time with respect to CPLR 205(a). As previously noted, in these circumstances, a trust is created pursuant to a pooling and service agreement (PSA), which includes certain representations and warranties regarding the mortgage loans that comprise the trust. The PSA also contains a "sole remedy" provision granting the trustee limited authority to seek a remedy for a breach of any of the representations or warranties. That remedy is the "repurchase protocol," which requires the sponsor to cure, repurchase, or provide a substitute for any nonconforming loan within 90 days of notice (or independent discovery) of a breaching loan.

Here, two certificateholders notified HSBC, as trustee, of certain breaches, and when HSBC did nothing, they attempted to file an action against the sponsor exactly six years from the closing date. Six months later, after the sponsor's demand for a complaint, HSBC filed a complaint on behalf of the trust purportedly as a substitute plaintiff for the certificateholders. During the pendency of the appeal of the Appellate Division's dismissal of the certificateholders' action (ultimately affirmed by the Court of Appeals), HSBC brought this separate action against the sponsor after the expiration of the statute of limitations. It alleged that the certificateholders' action was timely, the action was dismissed less than six months before it commenced this action, and thus CPLR 205(a) applied. The trial court granted the sponsor's motion to dismiss, and the Appellate Division affirmed.

An overwhelming majority of the Court of Appeals affirmed. There was no dispute that the plaintiff here, HSBC, was not the same entity as the plaintiffs in the first action. Referring back to its decision in *Reliance*, the majority reiterated that CPLR 205(a) can only benefit the same plaintiff from the first action. It noted that the statute provides an exception to the "same" plaintiff requirement, that is, where the "plaintiff dies and the cause of action survives, his or her executor or administrator" can bring the second action. The Court reasoned that

> [h]ad 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.

Id. at *9–10.

Citing to myriad examples, the majority stressed that where the legislature creates one exception, as here, the Court 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

IN THIS ISSUE

may have interests similar or identical to those of a plaintiff or a defendant it has typically said so." *Id*. at *10.

The Court rejected HSBC's argument that the *Reliance* decision acknowledged that CPLR 205(a) applies where successive actions seek to vindicate the same rights. "To the contrary, in *Reliance*, the Court reaffirmed that 'the fact that one party commenced an action which is subsequently dismissed, will not serve to justify application of [CPLR 205 (a)] so as to support a later action by a different claimant' (citation omitted)." *Id*. at *11.

The Court concluded that the instant case was just like *Reliance:*

> Here, as in *Reliance*, 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." 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"—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 (citations omitted).

Id. at *14.

To the lone dissenter, Judge Wilson, the issue was whether the "plaintiff" is the real party in interest, "not the nominal entity filing suit for whatever procedural reason may exist." He distinguished the *Reliance* case, relating to a corporation, as opposed to the trust in this action:

> At issue here is a trust, not a corporation. Because a trustee has legal title only, it suffers no injury from wrongful depredations of the trust corpus—only the trust beneficiaries do. A trustee is a nominal party. Any suit by a trustee is necessarily for the sole benefit of a trust's beneficiaries; indeed, a trustee has a fiduciary duty to protect their interests in the trust. As we recently recognized in the RMBS context, the trustee "is suing in merely a representative capacity" (citation omitted).

Id. at *25.

Here, Judge Wilson asserted that the only real party in interest was the trust, regardless of the identity of the nominal plaintiff.

Net Lessee Contractually Obligated to Pay Real Estate Taxes Could File Grievance Under RPTL § 524

Thus, Net Lessee Could File Judicial Proceeding Upon Rejection of the Grievance

In *Matter of DCH Auto v. Town of Mamaroneck,* 2022 N.Y. Slip Op. 03929 (June 16, 2022), DCH Auto leased a real property parcel. It agreed, as a "net" lessee, to pay, in addition to rent, all real estate taxes with respect to the property. Believing the property's assessments were too high, it challenged them and filed grievance complaints with the local board of assessment review. When the board denied the challenges, DCH filed judicial petitions for review. They were dismissed by the trial court, on the ground that only the "owner" can file the initial grievance complaint, a condition precedent to the filing of the judicial proceeding. The Appellate Division affirmed.

A unanimous Court of Appeals reversed, holding that the net lessee could file a grievance complaint and then bring a RPTL article 7 proceeding upon rejection of the grievance. The Court noted that DCH timely challenged the tax assessments and thereafter timely filed the judicial petitions. In addition, at the time that DCH had filed its grievances, the Town website represented that "[a]ny person aggrieved by an assessment," including "a tenant who is required to pay the real estate taxes pursuant to a lease," can file a complaint. Similar instructions were contained on the website of the New York State Department of Taxation and Finance's Office of Real Property Tax Services.

The Court pointed to RPTL § 524, which provides for a two-step process for reviewing property tax assesments: "a *complainant* who is dissatisfied with a property assessment" can seek administrative review by filing a grievance *and* then an "aggrieved party" can seek judicial review under RPTL article 7 once the board of assessment makes its determination. Here, the issue related to the first step, and the question was whether DCH was permitted to file the grievance even though it was not the owner of the property. Specifically, the dispute surrounded the phrase in RPTL § 524(3) requiring that the initial complaint be made "by the person whose property is assessed." Significantly, RPTL 704(1), which governs the second step, provides that "[a]ny person claiming to be *aggrieved* by any assessment" can file a petition.

The Town argued that proper filing of the grievance was a condition precedent to the judicial review of the determination; the language in RPTL § 524(3) requires the grievance to be filed "by the person whose property is assessed"; and that that language requires the property owner to file the grievance. The Town maintained that after the owner files the grievance (administrative complaint), "any aggrieved person" (including the net lessee) can file the judicial petition.

The Court acknowledged that RPTL § 524(3) presented an ambiguity, since the phrase "person whose property is assessed" is not defined in the RPTL and is subject to more than one reasonable interpretation. Nevertheless, the Court pointed to the fact that RPTL § 524(3) does not expressly require that the owner file the grievance:

> Had the legislature intended to require that only "owners" (or agents of owners) could initiate a grievance under RPTL 524 (3), it would have been simple to use that word. Indeed, in RPTL article 5, the legislature used the word "owner" myriad times. "We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended." Here, the statutory language is broader—it provides that a complaint must contain a statement "by the person whose property is assessed" (RPTL 524 [3]). Similarly, RPTL 524 (3) provides that if a complaint is not filed by "the person whose property is assessed," then it may be filed by "some person authorized in writing by the complainant" (RPTL 524 [3]). Again, the legislature used the broad term "complainant," rather than the term "owner,"

> and the statute gives no indication that the class of people who can authorize a third party to make the complaint is different from the class of people who may themselves file a grievance complaint (citations omitted).

Id. at *9–10.

The Court also stressed that the legislative history supported its conclusion that net lessees obligated to pay taxes can file a grievance. In fact, "based on this evolution of the statutory text, and our Court's contemporaneous interpretations, it is clear that it was not the legislature's intent to limit the meaning of 'person whose property is assessed' to owners of real property." *Id*. at *14. Finally, its interpretation was consistent with construing the RPTL "as a whole" and with the guidance of the New York State Department of Taxation and Finance:

> Interpreting the RPTL such that a net lessee may both file the RPTL 524 (3) complaint and (as is undisputed) the RPTL 704 (1) petition, given that the complaint is a prerequisite to filing a petition, harmonizes the two statutory steps of our tax assessment scheme. Such a result ensures that the party with the economic interest and legal right to challenge an assessment will not be unable to raise a challenge because an out-of-possession landlord that lacks economic incentive fails to file an administrative complaint. It also avoids an inequitable result by which a net lessee may be precluded from obtaining full review of its assessment if the complaint was brought by an owner with different interests, because a petitioner in an RPTL article 7 proceeding may not add grounds for review beyond those specified in the original RPTL 524 (3) complaint (citation omitted).

Id. at *15.

Court of Appeals Rules That Only General Obligations Law § 17-105(1) Applies to an Action to Cancel a Mortgage

An Express Promise, as Opposed to a Mere Acknowledgment, is Required for Toll or Revival to Apply

Batavia Townhouses Ltd. v. Council of Churches Hous. Dev. Fund Co., 2022 N.Y. Slip Op. 03361 (May 24, 2022), asks which section of General Obligation Law (GOL) article 17 applies to toll or revive the statute of limitations in an action to cancel a mortgage where the statute of limitations to commence a foreclosure action has expired under RPAPL § 1501(4).

The relevant statutes include GOL § 17-101 which provides, in pertinent part, that

> [a]n acknowledgment or promise contained in a writing signed by the party to be charged thereby is the only competent evidence of a new or continuing contract whereby to take an action out of the operation of the provisions of limitations of time for commencing actions under the civil practice law and rules other than an action for the recovery of real property.

The other relevant provision is GOL § 17-105(1), providing that

> [a] waiver of the expiration of the time limited for commencement of an action to foreclose a mortgage of real property or a mortgage of a lease of real property, or a waiver of the time that has expired, or a promise not to plead the expiration of the time limited, or not to plead the time that has expired, or a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made, either with or without consideration, by the express terms of a writing signed by the party to be charged is effective, subject to any conditions expressed in the writing, to make the time limited for commencement of the action run from the date of the waiver or promise.

A majority of the Court of Appeals held that only GOL § 17-105(1) applies. It referred to the language in the statute expressly referencing a mortgage foreclosure action. Moreover, GOL § 17-101 specifically excludes "actions for the recovery of real property." The significance of the difference relevant here is that GOL § 17-105(1) requires an express promise to pay the mortgage debt, while GOL § 17-101 permits a mere "acknowledgement" to toll/revive the limitation period. The Court found that in this case there was no such express promise.

The Court rejected the argument that the word "promise" in GOL § 17-105(1) includes a mere acknowledgment, because it

> would render meaningless the distinction between an "acknowledgment or a promise" made in section 17-101. Treating an "acknowledgment" as being something different than a "promise" abides by the rule of statutory construction that "[w]hen different terms are used in various parts of a statute or rule, it is reasonable to assume that a distinction between them is intended." Additionally, section 17-105 (4)'s statement that outside of the provisions of that section "no acknowledgment, waiver or promise has any effect to extend the time" indicates that the legislature didn't intend for a mere acknowledgment to revive or toll the statute of limitations for a foreclosure action (citation omitted).

Id. at *8.

The majority stressed that the legislative history demonstrated that GOL § 17-105's purpose "was to require more express actions by a mortgage debtor to toll or revive the statute of limitations so as to prevent '[s]erious impairment of titles to land and hindrance of real property financing.'" *Id*. at *8–9.

In a partial dissent by Judge Wilson (joined by Judge Rivera), he opined that the majority erred by treating the note and mortgage in the case as if they were one instrument. He agreed with the majority that, with respect to the mortgage, GOL § 17-105 was the only applicable tolling/revival statute and that here there was no express promise to pay the mortgage debt. However, he insisted that GOL § 17-101, requiring only an acknowledgment, applied to the note. The dissent reasoned that

> [a] note is like an IOU. It is a contract in which a borrower agrees to repay a loan to a lender under certain terms and conditions. If a borrower does not pay back the loan according to the terms of the note, the lender can sue for breach of contract and obtain a money judgment for the value of the debt left unpaid under the note. A mortgage secures a note. By signing a mortgage, the borrower puts up a piece of property as collateral for the loan. That means that if the borrower does not pay back the loan, the lender may begin foreclosure proceedings—the legal process by which the property that is secured by the mortgage is sold to satisfy the debt (citations omitted).

Id. at *28–29.

The dissent concluded that the lower courts needed to resolve factual questions as to whether the relevant documents constituted an acknowledgment.

Court of Appeals Rules That Employee, not Employer, Is Entitled to Proceeds from Demutualization

Relevant Statute Governing Conversion is Dispositive on the Issue

A mutual insurance company is an insurance company that is "organized, maintained and operated for the benefit of its members." In *Columbia Mem. Hosp. v. Hinds, 2*022 N.Y. Slip Op. 03306 (May 19, 2022), Medical Liability Mutual Insurance Company (MLMIC) was a mutual insurance company that provided professional liability insurance. When National Indemnity Company (NICO) sought to purchase MLMIC, MLMIC submitted a "Plan of Conversion" (converting MLMIC from a mutual company to a stock insurance company) to the New York State Department of Financial Services (DFS). The plan provided for, among other things, the distribution of $2.502 billion in cash to "Eligible Policyholders."

DFS approved the plan, which by its terms was subject to a policyholder vote. Two-thirds of the policyholders approved the plan. The plan also established objection and escrow procedures where, upon a timely objection, funds would be placed in escrow pending resolution of the parties' conflict.

The question presented in *Columbia Mem*., involving appeals in eight cases, was who was entitled to receive the proceeds from the demutualization: the employer who paid the policy premium or the employee, the named policyholder. In each of the cases, a medical professional/employee was the sole named policyholder of a MLMIC professional liability policy; the medical practice/employer had agreed to provide insurance coverage in the employee's employment contract; and, in most of the cases, the employer had been designated as the policy administrator. The results in these cases split at the trial level, but ultimately the Appellate Division ruled in favor of the medical professionals/employees.

A unanimous Court of Appeals held that where there were no contrary provisions in the employment contract, the insurance policy or in a separate agreement, as here, the employee-policyholder is entitled to the proceeds.

The Court of Appeals first focused on Insurance Law § 7307(a)(3), which governs conversion from a mutual company to a stock company. As part of that process, "when an insurance company demutualizes, it must exchange the equitable share of 'each eligible mutual policyholder' for, as relevant here, consideration. That makes sense given the nature of the corporate structure of a mutual insurance company—it is owned by its policyholders and operated for their benefit." *Id*. at *10.

The Court also pointed to the "other rights exclusively held by policyholders" where there is a demutualization, including prompt notice and that the plan can only be adopted where two-thirds of the voting policyholders approve it. Insurance Law § 7307. Thus, the Court held that pursuant to the statutory language the policyholder is entitled to the cash consideration where a mutual insurance company demutualizes:

> Here, it is undisputed that each medical professional/employee was the sole named policyholder of a professional liability insurance policy issued by MLMIC. Further, no contract of employment, insurance policy language, or separate agreement in any of the eight cases purported to assign the employee/policyholder's rights in the demutualization consideration to anyone.

Id. at *12.

The Court rejected the employers' argument that because they paid the premiums and administered the underlying policies, they were the "de facto" owners of the policies and thus were entitled to the cash consideration. The Court found instead that the premiums paid were for the cost of coverage, not an ownership interest. Moreover,

> {a} policyholder's designation of her or his employer as a policy administrator does not convert the employer into a policyholder or member; it merely authorizes the employer to undertake various tasks on behalf of the employee policyholder. Indeed, that some of the employees/policyholders explicitly delegated to their employers the right to receive dividends on their behalf pursuant to the MLMIC policies cuts against the employers' claim to the demutualization consideration given that, in all eight cases, the employees/policyholders refused to assign such rights to demutualization consideration to their employers, despite several of the employers repeatedly seeking such assignment.

Id. at *13.

The Court similarly rejected the argument that, because the employees paid no premiums themselves, they had no allocable share. The relevant statute does not address to whom the cash consideration is to be paid; it merely deals with the method of allocation of the consideration among the mutual insurance company member owners. In addition, the premiums paid by the employers "are ultimately attributable to the employee for purposes of Insurance Law § 7307." *Id*. at *15.

Finally, the Court dismissed the employers' unjust enrichment theory. To prevail of such a theory, it must be shown "that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.'" *Id*. at *16. The Court held that the employers failed to establish any of the factors.

The demutualization payment did not unjustly enrich the employees; it was compensation for the policyholder/employees' loss of something of value, that is, their ownership interest as MLMIC members. The cash consideration going to the employees was not made at the employers' expense. The employees' ownership interest in MLMIC "was incident to the corporate structure of mutual insurance companies" and was "was wholly unrelated" to the employers' payment of the policy premiums. In addition, the premium payments were the result of negotiated contracts; the employers received the employees' labor in exchange for this consideration. Finally, there was nothing inequitable here. The employees were due the demutualization payments under the statute and the employers "could have written agreements assigning the demutualization benefits to themselves had they so chosen and their failure to do so does not render the outcome inequitable." *Id*. at *19.

Wishing each of you a wonderful and peaceful summer.
David

New York State Law Digest | No. 740   July 2022

ISSN 0028-7636 (print) ISSN 2379-1225 (online)