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Summarizing recent significant New York appellate cases

The New York Court of Appeals did something this week that it rarely does. After the United States Court of Appeals for the Second Circuit certified a novel question of state law to the Court of Appeals, the Court of Appeals declined, respectfully, to take the case. Although the Court's one-line order does not offer any reasoning to explain the decision, its prior similar decisions in the handful of other cases where it has declined a certified question offers some perspective. This week, let's take a look at that order and what else has been happening in New York's appellate courts over the past week.

COURT OF APPEALS

CIVIL PROCEDURE, CERTIFIED QUESTIONS

***East Fork Funding v U.S. Bank, National Association*, No. 127 (Ct App Oct. 24, 2024)**

Issue: **Do Sections 4 and/or 8 of the Foreclosure Abuse Prevention Act, codified at N.Y. C.P.L.R. 203(h) and 3217(e), respectively, apply to a unilateral voluntary discontinuance taken prior to the Act's enactment?**

Facts: The **United States Court of Appeals for the Second Circuit earlier in October certified that novel question of state law to the New York Court of Appeals** to assist the Second Circuit with its decision in a pending appeal. As the Second Circuit explained the background of the appeal, "[i]n 2020, . . . East Fork Funding LLC filed this quiet title action against . . . U.S. Bank, N.A., on a mortgage recorded against East Fork's property. The mortgage had already been subject to three foreclosure actions, two of which had been voluntarily discontinued by the mortgagee. The district court granted summary judgment in favor of East Fork, holding that under the Foreclosure Abuse Prevention Act ('FAPA'), enacted in December 2022, the voluntary discontinuances did not reset the six-year statute of limitations to bring a foreclosure action. The statute of limitations therefore continued to run from the commencement of the first foreclosure action in 2010 and ran out six years later, entitling East Fork to quiet title. On appeal, U.S. Bank argues that FAPA does not apply to voluntary discontinuances that took place prior to FAPA's enactment, that such retroactive application would be unconstitutional, and that under pre-FAPA law the voluntary discontinuances did reset the statute of limitations."

Analyzing whether certification was appropriate under four factors, the Second Circuit noted that "the New York Court of Appeals has not addressed FAPA's retroactive scope, and the rulings of the intermediate appellate courts are insufficient to predict how the Court of Appeals would decide the issue." Additionally, the Court noted, "the statute's plain language does not dictate the answer. Even if FAPA applies retroactively to all pending actions involving mortgage contracts signed before the statute's enactment, it is not clear whether it must also apply to a noteholder's voluntary dismissal—taken before FAPA's enactment—of a foreclosure action that itself is no longer pending." Because the answer to the question could have significant impacts on New York's mortgage market, the Second Circuit decided that certification was appropriate.

It did note under the fourth factor, however, that the answer to the certified question would "not resolve the case entirely. If the Court of Appeals were to hold that FAPA does apply retroactively to prior voluntary discontinuances, we would then consider whether such retroactive application is constitutional. If the Court of Appeals were to hold that FAPA does not apply retroactively in that way, we would then consider East Fork's arguments that the voluntary discontinuances were invalid even under *Engel* and that it is entitled to quiet title even if a foreclosure action is not time-barred."

Analysis: Although the Court of Appeals routinely accepts certified questions from the United States Courts of Appeals, and decides those cases quickly, this was not a routine case. Indeed, the Court retains discretion to review the proposed certified question and to decide whether to accept it (*see* 22 NYCRR 500.27 [d] ["The Court, on its own motion, shall examine the merits presented by the certified question, to determine, first, whether to accept the certification and, second, the review procedure to be followed in determining the merits."]). And here, the Court of Appeals declined to take up the Second Circuit's certified question.

The Court has occasionally in the past declined to accept questions that have been certified to it. In fact, the Court has declined a certified question six times before this, and each time, except in the most recent case before this, has explained why it was refusing to consider the questions. In one example, one of the parties refused to participate in the certification to the Court of Appeals, forcing its counsel to move to withdraw from its representation. Seeing that, the Court, on its own motion, reconsidered its prior order accepting the certified question and then declined them (*see Joseph v Athanasopoulos*, **18 NY3d 946**, 947 [2012]). Before that, in 2000, the Court of Appeals refused to accept certified questions that arose in the context of a preliminary injunction order in a First Amendment prior restraint case. The Court

reasoned that hearing the case would only further delay the resolution of the constitutional rights at issue, and it wouldn't address a state constitutional issue that the Second Circuit had certified, but the parties had never raised (*see Tunick v Safir*, **94 NY2d 709**, 711 [2000]).

In another, the Court of Appeals declined a certified question in an ERISA case because it was not likely to recur, and the parties weren't likely to be much help in deciding it (one was pro se, another didn't submit a brief, and the third didn't have an interest at stake in the question) (*see Grabois v Jones*, **88 NY2d 254**, 255 [1996]).

In the fourth, the Court of Appeals decided against taking certified questions from the Second Circuit that were already pending on appeal before the Appellate Division, because it would upset the normal procedure for state court proceedings (*see Rufino v United States*, **69 NY2d 310**, 311-312 [1987]).

And the Court of Appeals has more than once declined to take up the Second Circuit's certified question in immigration cases. Because immigration is exclusively a matter for the federal courts, and not likely to arise in any state court case, the Court has been reluctant to get involved in those cases, even when they present a novel or unsettled issue of New York law. As the Court previously explained:

> Additionally, this exclusive Federal matter—Immigration and Naturalization—presents a fact pattern that would most likely not arise in any State court proceeding. Indeed, the Federal courts—the unique forums to handle litigation involving the INS—are in the best position to assess and rule with respect to that Agency's agents and activities in New York for jurisdictional purposes. Thus, the tendered issues are better left for definitive resolution by the Federal courts themselves . . .

(*Yesil v Reno*, **92 NY2d 455**, 457 [1998]).

More recently, in 2021, the Court of Appeals again declined to accept a certified question in an immigration appeal from a final order of removal. the Second Circuit asked the Court of Appeals to review whether the intent element of New York crime of petit larceny "requires an intent to deprive the owner of his or her property either permanently or under circumstances where the owner's property rights are substantially eroded, which . . . is how the [Board of Immigration Appeals] defines a theft involving moral turpitude" (**Second Circuit Certification Order**, at 5). The Second Circuit's opinion, however, was less than convincing that it actually wanted the Court of Appeals' answer. In discussing how the BIA has defined theft crimes as crimes of moral turpitude for removal purposes, the Second Circuit all but rejected the petitioner's arguments that the intent required for New York's crime of petit larceny did not qualify (*id.* at 9-10). The Second Circuit reviewed the Court of Appeals' prior precedent on larceny and basically decided, without deciding, that New York law aligns with the BIA's standard for crimes of moral turpitude (*id.* at 10-11). Indeed, it couldn't have been put more bluntly than this:

> Given these New York cases, if certification were not available, we would likely hold that NYPL § 155.00 conforms to the BIA's definition of a CIMT, and does require an intent to deprive owners of their property permanently, or in such a way that their property rights are "substantially eroded." In other words, we would read Jennings as applying to both sub-sections (a) and (b) of NYPL § 155.00(4). As a result, if the NYCA declines certification we would most probably agree with the government that petit larceny in New York constitutes a CIMT.

(*id.* at 13-14). After that, the Court of Appeals likely didn't see the need to weigh in.

So what could explain the Court of Appeals' decision not to take the certified question in *East Fork Funding*? Although the foreclosure statute of limitations question under FAPA is certainly novel, and the Court could have had any one of a number of reasons to decline the certified question, I would venture a guess that it was the Second Circuit's fourth factor that tipped the scales against deciding the question. The Court of Appeals' word on the interpretation of New York statutes is the final one, but here it wouldn't decide the appeal before the Second Circuit. The Court of Appeals' interpretation would only let the Second Circuit move on to the next questions of the statute's constitutionality or whether other bases existed to cancel the mortgage. In those unique circumstances, it may well be that the Court felt that the question of FAPA's retroactivity should remain an open question of state law until it is squarely presented in any number of mortgage foreclosure actions that are percolating at the Appellate Division and in New York's trial courts (*see* the *U.S. Bank N.A. v Lynch* summary below). For this one, let the Second Circuit decide what it thinks New York law would hold, and then apply that non-binding interpretation to the facts of the appeal. That may or may not be the case, but it's my best speculation, since the Court of Appeals did not provide any reasoning for its decision to deny the certified question.

To ensure that the Second Circuit won't be discouraged from certifying open questions of New York law in the future, however, the Court of Appeals has, repeatedly in the past, made sure to explain how valuable it feels certification can be:

> We take this opportunity to underscore the great value in New York's certification procedure where Federal appellate courts or high courts of other States are faced with determinative questions of New York law on which this Court has not previously spoken. Indeed, the certification procedure can provide the requesting court with timely, authoritative answers to open questions of New York law, facilitating the orderly development and fair application of the law and preventing the need for speculation. As shown by actual experience, and by this Court's acceptance of all but a very few of the questions that have been certified to us by the Circuit Court, inter-jurisdictional certification is an effective device that can benefit Federal and State courts as well as litigants . . .

(*Tunick*, 94 NY2d at 711-712). This case just wasn't the right one.

MATRIMONIAL LAW, EQUITABLE DISTRIBUTION

***Szypula v Szypula*, 2024 NY Slip Op 05177 (Ct App Oct. 22, 2024)**

Issue: When marital funds are used to augment a spouse's Foreign Service pension so that it included credit for his pre-marriage military service, is the portion of the pension related to the pre-marriage military service separate or marital property?

Facts: The husband joined the Navy in 1987, and was married to the wife nine years later. Two years after that, the husband left the Navy, and was not entitled to retirement pay because he had not completed 20 years of service before retiring. In 2012, the husband "joined the Foreign Service and enrolled in the Foreign Service Pension System (FSPS). Veterans who join the Foreign Service—like [the husband]—may add their years of military service to their FSPS pensions by making additional contributions for the years they served in the military." Taking advantage of that benefit, the parties used marital funds for six years to buy back the husband's eleven years of Navy service, at a total cost of $9,158.00.

After the parties filed for divorce, they could not agree on whether the FSPS credit for the husband's pre-marriage military service was marital of separate property. Supreme Court held that it was marital property because the parties use marital funds to buy back that credit. The Appellate Division reversed, holding that only the marital funds, and not the FSPS credit, was marital property subject to equitable distribution.

Holding: The Court of Appeals agreed with Supreme Court. Although the Court's prior caselaw had been limited to holding that "vested pension rights are marital property to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action," the Court held that this case was different. Because the parties used marital funds to buy back pension credits for pre-marriage military service, they effectively commingled what would have otherwise been the husband's separate property with marital property. In doing so, the Court held, the parties "transformed the pension credits from separate property into marital property" subject to equitable distribution.

THIRD DEPARTMENT

MORTGAGE FORECLOSURE, FORECLOSURE ABUSE PREVENTION ACT

***U.S. Bank N.A. v Lynch*, 2024 NY Slip Op 05261 (3d Dept Oct. 24, 2024)**

Issue: Does the Foreclosure Abuse Prevention Act apply retroactively?

Facts: In 2006, defendant took out a mortgage on real property in Rensselaer County. In 2008, plaintiff commenced this action, alleging that defendant had defaulted on the loan and seeking to foreclose on the mortgage. Supreme Court granted the plaintiff's motion for summary judgment in 2011, but the plaintiff failed to file the order granting the motion as directed or to take any other action. So, the 2008 action was "marked off" as inactive in 2012.

In 2015, Plaintiff commenced a second foreclosure action against defendant. After defendant defaulted, a different judge of Supreme Court granted plaintiff's motion for a judgment of foreclosure and sale. Before the judgment was enforced, however, defendant moved to vacate the judgment, and the court granted her motion, finding that defendant established a reasonable excuse for her default and a potentially meritorious defense. Following cross motions for summary judgment, Supreme Court held that plaintiff had accelerated the entire mortgage debt when it commenced the 2008 action and failed to de-accelerate it before the expiration of the six-year statute of limitations. Thus, the 2015 action was dismissed as time-barred.

Not to be deterred, in December 2022, plaintiff moved to restore the 2008 action to the calendar. Supreme Court granted the motion, restored the 2008 action to the calendar, and rejected defendant's argument that the Foreclosure Abuse Prevention Act required dismissal of the 2008 action as time-barred.

Holding: The Third Department reversed, holding that the FAPA does apply retroactively and barred the 2008 action as well. The Court explained, following the Court of Appeals' decision in *Freedom Mtge. Corp. v Engel* (**37 NY3d 1** [2021]), the Legislature specifically set out to clarify then-existing law that had "allowed noteholders to unilaterally manipulate statutes of limitations to their advantage and to the detriment of homeowners." The Court noted, under FAPA, "where 'an action to foreclose a mortgage or recover any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to foreclose the mortgage or recover any part of the same mortgage debt shall also be barred by the statute of limitations' (RPAPL 1301 [4])." Thus, "The Legislature enacted FAPA to clarify existing law to ensure that statutes of limitations provide finality."

Noting that legislative amendments are generally presumed to apply prospectively, the Court held that "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." Here, the Court held, retroactive application was what the Legislature had intended. "In exercising its legislative judgment, the Legislature set forth the process available to noteholders to foreclose a mortgage, including the manner in which the statute of limitations may be tolled or restarted, while also ensuring that homeowners are not overburdened by having to defend multiple actions ad infinitum. Further, the Legislature clearly set forth that FAPA 'shall take effect immediately and shall apply to all actions commenced on an instrument described under [CPLR 213 (4)] in which a final judgment of

foreclosure and sale has not been enforced' (L 2022, ch 821, § 10). For the foregoing reasons, we find that FAPA should be applied retroactively to effect its beneficial purpose."

The Court next rejected the plaintiff's argument that retroactive application of FAPA violated its due process rights. Noting that the statute only need to be supported by a "legitimate legislative purpose furthered by rational means," and that this "standard [was] not exacting," the Court held that FAPA's legislative clarifications of then-existing caselaw were "rationally related to the legitimate legislative purpose of providing a mechanism for parties to resolve their disputes with finality" and thus "retroactive application of FAPA to foreclosure actions where a final judgment has not been enforced does not violate plaintiff's due process rights."

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