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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX PART 24

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1900 CAPITAL TRUST III, BY U.S. BANK TRUST  
NATIONAL ASSOCIATION, etc.,

Index No. 36200/2020E

Hon. **Doris M. Gonzalez,**  
Justice Supreme Court

Plaintiff,

- against -

MARIA C. GUAMAN, et al.,

Defendants.

-----X  
The following papers numbered as indicated below were read on these motions  
(NYSCEF Seq. No. 1) noticed on \_\_\_\_\_ and duly submitted as **No.** \_\_\_\_\_ on the Motion  
Calendar of \_\_\_\_\_

Motion Sequence No. 1	As indicated in NYSCEF
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Upon the foregoing papers, the motion listed above is decided in accordance with  
the annexed decision and order.

Dated: 4-28-2022

Hon.   
**Doris M. Gonzalez, J.S.C.**

- X
- |                              |  |   |
|------------------------------|--|---|
| 1. CHECK ONE.....            | <input type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY | <input checked="" type="checkbox"/> CASE STILL ACTIVE   |
| 2. MOTION IS.....            | <input type="checkbox"/> GRANTED                       | <input checked="" type="checkbox"/> DENIED <input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER |
| 3. CHECK IF APPROPRIATE..... | <input type="checkbox"/> SETTLE ORDER                  | <input type="checkbox"/> SUBMIT ORDER   |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

-----X  
1900 CAPITAL TRUST III, BY U.S. BANK TRUST  
NATIONAL ASSOCIATION, etc.,

Plaintiff,

DECISION and ORDER  
Index No. 36200/2020E

- against -

MARIA C. GUAMAN, et al.,

Defendants.

-----X

Doris M. Gonzalez, J.

In this mortgage foreclosure action, defendant Maria C. Guaman (“defendant”) moves for an order dismissing the plaintiffs’ verified complaint as barred by the Statute of Limitations.

This is an action to foreclosure a mortgage. It is undisputed that plaintiff’s predecessor in interest in 2009 commenced a prior mortgage foreclosure action. The 2009 action was dismissed by the Appellate Division, First Department on appeal from an order of this court (Thompson, J.), which denied the defendant mortgagor’s motion to dismiss. The First Department held that the action was not properly commenced as the plaintiff failed to serve a 30-day contractual notice of default prior to the commencement of the 2009 action, and that the action should accordingly be dismissed without prejudice. (*Prof-2013-S3 Legal Tit. Trust II v Guaman*, 177 A.D.3d 545, 110 N.Y.S.3d 844 [1st Dept. 2019].)

This second action was commenced on August 31, 2020. It is largely undisputed that save for the legal issue of the identity of the plaintiff in the first and second actions, the plaintiff’s second action would be timely under CPLR 205(a).<sup>1</sup>

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<sup>1</sup> CPLR 205(a) provides a six-month window after dismissal to commence a new action, and to avoid the bar of the statute of limitations. CPLR 205 (a) provides, in relevant part,

A party who moves to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired. The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period. (*Wells Fargo Bank N.A. v. Kehres*, 2021 N.Y. App. Div. LEXIS 6237, 2021 NY Slip Op 06212 [2d Dept. 2021].)

As an initial matter, it is clear that CPLR 205(a) applies to mortgage foreclosure actions generally, so long as the prior action was not dismissed for neglect to prosecute. (*Deutsche Bank Nat'l Trust Co. v. Gouin*, 194 A.D.3d 479, 143 N.Y.S.3d 554 [1st Dept. 2021].) It is not disputed, as noted above, and the court finds, that the prior action was not dismissed for failure to prosecute, and that CPLR 205(a), if otherwise applicable renders the present action timely, as the action was recommenced within the window period, as extended by COVID-19--related Executive Orders. (*U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc.*, 33 N.Y.3d 72, 75, 122 N.E.3d 40, 41, 98 N.Y.S.3d 523, 524 [2019] [CPLR 205[a] applied despite plaintiff's failure to comply with a condition precedent prior to the expiration of the statute of limitations].)

At issue here is whether the plaintiff in the first action must be the same plaintiff in the second action for CPLR 205(a) to apply. Defendant argues that a former assignor of the note and mortgage commenced the first action, and that the present plaintiff was assigned the note in August 2019, prior to the dismissal of the former action, but also prior to any formal substitution. In

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"If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, [the plaintiff's] executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

*Reliance Ins. Co. v. Polyvision Corp.* (9 N.Y.3d 52, 845 N.Y.S.2d 212, 876 N.E.2d 898 [2007]), the Court of Appeals strictly construed the term “plaintiff” to exclude from the protection of CPLR 205 the parent company of the original plaintiff to the action. In rejecting the parent company’s argument that CPLR 205(a) should apply, the Court noted that the original plaintiff was an incorrect party, and that the proper plaintiff never sought to intervene prior to the dismissal of the former action.

In the context of mortgage foreclosure actions, the Second Department has rejected the arguments now raised by the defendant. In *Wells Fargo Bank, N.A. v. Eitani*, (148 A.D.3d 193, 47 N.Y.S.3d 80 [2d Dep’t 2017]), the Second Department held that a second action was timely under CPLR 205(a), even though the plaintiff in the second action was not the named plaintiff in the first action, but instead, was an assignee of the note. (See David L. Ferstendig, *Majority of Second Department Holds That CPLR 205(a) Applies Even Where Plaintiffs in First and Second Actions Are Different*, 677 N.Y.S.L.D 3,4 [2017]). As explained by the Second Department:

“However, this [defendant’s] argument overlooks the fact that when Argent transferred the note and mortgage to Wells Fargo on January 24, 2008, and recorded the assignment on February 14, 2008, Wells Fargo became Argent’s successor in interest with respect to the right to foreclose under the note and mortgage (see generally *YMJ Meserole, LLC v 98 Meserole St., LLC*, 133 AD3d 848, 20 NYS3d 407 [2015]; *Central Fed. Sav. v 405 W. 45th St.*, 242 AD2d 512, 662 NYS2d 489 [1997]). As the assignee of the mortgage, Wells Fargo had a statutory right, pursuant to CPLR 1018, to continue the prior action in Argent’s place, even in the absence of a formal substitution (see CPLR 1018; *U.S. Bank N.A. v Akande*, 136 AD3d 887, 889, 26 NYS3d 164 [2016]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 1001, 17 NYS3d 137 [2015]; *Central Fed. Sav. v 405 W. 45th St.*, 242 AD2d 512, 662 NYS2d 489 [1997]). Since, by virtue of CPLR 1018, the prior action could have been continued by Argent’s successor in interest, Wells Fargo was, in actuality, the true party plaintiff in the prior action, and is entitled to the benefit of CPLR 205 (a). This conclusion is in keeping with the remedial purpose of CPLR 205 (a) and the legislative intent underlying enactment of the statute.” (Id at 199.)

The Second Department reached the same result in *U.S. Bank N.A. v. Gordon* (158 A.D.3d 832, 72 N.Y.S.3d 156 [2d Dep’t 2018]), holding:

“Although, as a general matter, only the plaintiff in the original action is entitled to the benefits of CPLR 205 (a), the Court of Appeals has nevertheless recognized an exception to this general rule under certain circumstances where the plaintiff in the new action is seeking to enforce "the rights of the plaintiff in the original action" (*Reliance Ins. Co. v Polyvision Corp.*, 9 NY3d 52, 57, 876 NE2d 898, 845 NYS2d 212 [2007]; see *George v Mt. Sinai Hosp.*, 47 NY2d 170, 179, 390 NE2d 1156, 417 NYS2d 231 [1979]). More specifically to the facts here, this Court has recently held that "a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205 (a) where . . . it is the successor in interest as the current holder of the note" (*Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193, 195, 47 NYS3d 80 [2017]).” (Id at 838.)

Defendant relies on *US Bank N.A. v. UBS Real Estate Sec., Inc.* (177 A.D.3d 493, 113 N.Y.S.3d 682 [1st Dep’t 2019]), in arguing that the named plaintiff in each foreclosure action must be identical. There, the First Department held that the trustee of a residential mortgage-backed securities trust was not a proper “plaintiff” within the meaning of CPLR 205(a) when the trust’s certificate holders commenced the prior action. That action, however, and the precedent on which the First Department relied, was based on a contractual dispute arising out of the management of residential mortgage-backed securities, and the action did not involve a mortgage foreclosure. Thus, a key distinction exists between this action and *US Bank N.A. v. UBS Real Estate Sec., Inc.*, in that the present plaintiff as an assignee was the real party in interest in the prior action prior to the dismissal of that action, and was entitled to prosecute the prior action even without a formal substitution.

Accordingly, this Court finds that the action was timely commenced under CPLR 205(a). It is therefore,

ORDERED that the motion is denied.

This is the Decision and Order of the Court.

Dated: 4-28-2022

  
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Doris M. Gonzalez, J.S.C.