

NY Ruling Offers Mortgage Lenders Foreclosure Alternative

By **Christopher Gorman** (January 27, 2021)

The new year is virtually certain to bring important decisions from the New York Court of Appeals on the issue of the statute of limitations in mortgage foreclosure actions.

Last year, however, ended with *CitiMortgage Inc. v. Ramirez*, which may be a significant decision from the New York State Supreme Court Appellate Division, Third Department, carving out a potential exception to the mortgage foreclosure statute of limitations period in cases where a lender's efforts at foreclosure have been thwarted or otherwise not effectuated for extensive periods of time following the default on a loan.[1]



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Promissory note enforcement actions, generally speaking, are not the preferred course of action for lenders holding a defaulted loan that is secured by both a promissory note and a mortgage recorded against real property.

That is because a mortgage foreclosure action, as opposed to an action strictly on the promissory note, allows the lender to foreclose upon its security, usually in the form of real property, and to auction and sell the real property upon obtaining a judgment in order to satisfy the debt.

Promissory note enforcement actions, on the other hand, usually leave a lender to its own devices in terms of finding security or assets owned by the defaulting borrower to satisfy any judgment that the lender may obtain as a result of the enforcement of the promissory note through court proceedings.

The *Ramirez* decision, however, may alter that dynamic, particularly when dealing with debts secured by a promissory note and mortgage which may arguably be barred from enforcement by the statute of limitations if a mortgage foreclosure action is commenced by the lender.

In *CitiMortgage Inc. v. Ramirez*, the Third Department held that an action to enforce a promissory note was timely commenced and not barred by the statute of limitations, due largely to the fact that the appellate court concluded that the statute of limitations period to enforce the promissory note was tolled during the entirety of the period in which a prior mortgage foreclosure action — dismissed for failure to prosecute — was pending.

Ramirez may very well open up another avenue of enforcement to a frustrated lender whose efforts to prosecute a mortgage foreclosure action against a long-defaulted borrower may be time-barred under the governing statute of limitations in mortgage foreclosure actions.

The Ramirez Decision

On May 5, 2010, CitiMortgage commenced a foreclosure action against the borrower, Jose Ramirez. On Oct. 30, 2013, the trial court dismissed that action because of Citi's failure to prosecute.

In 2017, Citi commenced a second foreclosure action. That second foreclosure action was dismissed by the trial court on the grounds that the statute of limitations had expired in May 2016 — i.e., a period of time outside of New York's six-year statute of limitations period, determined from the date of acceleration, which would have been the date of the filing of the first foreclosure action on May 5, 2010, governing mortgage foreclosure actions.

In May 2019, Citi commenced an action on the promissory note seeking a money judgment against the borrower for the unpaid balance of the promissory note. Ramirez "moved preanswer to dismiss the complaint on the grounds that it was barred by, among other things, the doctrine of res judicata and the statute of limitations." The Supreme Court of New York, Schenectady County, granted the borrower's motion pursuant to New York Civil Practice Law and Rules, or CPLR, Section 3211(a)(5). Citi appealed.

The Appellate Division held on the issue of the statute of limitations defense that Citi established that the promissory note enforcement action was timely by demonstrating a tolling of the statute of limitations, and that the Supreme Court's decision finding to the contrary was to be reversed.

Citi's arguments on appeal focused upon what the appellate court described as the interplay between two statutory provisions: New York Real Property Actions and Proceedings Law Section 1301(3) and CPLR Section 204(a).

RPAPL Section 1301(3) is part of the statutory embodiment of the election of remedies doctrine and it provides that, while an action upon a mortgage debt "is pending or after final judgment for the plaintiff, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought."

Citi argued that this statutory provision prohibited the filing of a subsequent action, i.e., an action to obtain a money judgment on the promissory note, while the former actions, i.e., to foreclose upon the mortgage, were pending.

Citi further argued that the commencement of an action to pursue a money judgment on the promissory note was similarly stayed during the pendency of the first foreclosure action by CPLR Section 204(a). CPLR 204(a) provides that, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced."

The Appellate Division, Third Department, effectively accepted these arguments made by Citi in finding that the promissory note enforcement action was timely commenced.

The Appellate Division, Third Department concluded that a "statute that acts as 'blanket ban on filing or continuing lawsuits' constitutes a stay subject to the tolling provision of CPLR 204(a)" and, in fact, that the "toll during a stay due to a 'statutory prohibition' under CPLR 204(a) has been held to apply to the provisions of RPAPL 1301."

In other words, the Appellate Division, Third Department found that the limitations imposed by RPAPL Section 1301(3), which required a creditor to "seek leave of court to commence another action to recover a part of a mortgage debt" effectively constituted a stay within the meaning of CPLR Section 204(a).

As a result, the Appellate Division, Third Department concluded in Ramirez that the statute of limitations "was tolled during the pendency of the first foreclosure action, from May 2010

to October 2013," thereby rendering Citi's commencement of the promissory note enforcement action in May 2019 timely under the applicable six-year statute of limitations.

The Potential Impact of Ramirez

Ramirez has the potential to be a significant decision because it leaves open the possibility that a lender can still bring a claim against a borrower for a money judgment on a promissory note under circumstances where the lender would be precluded from bringing a mortgage foreclosure action against that same borrower due to the expiration of the statute of limitations governing mortgage foreclosure actions.

This is a particularly significant option for lenders, as it may offer a lender alternative relief to try to recover on a long-defaulted indebtedness where, through negligence, delay or other omissions, the lender has allowed the statute of limitations on a mortgage foreclosure claim to lapse.

Ramirez, therefore, begs the question of whether the courts will now see a flood of litigation in the form of promissory note enforcement actions in cases where mortgage foreclosure actions were previously dismissed against borrowers.

It is likely that, in the wake of the 2008 mortgage foreclosure crisis, there were hundreds — perhaps thousands — of residential foreclosure actions dismissed from New York state courts on the grounds that those cases were barred by the applicable statute of limitations. Ramirez leaves open the question of whether the lenders in those cases can now pursue those borrowers again through the court system on a breach of promissory note theory.

Only time will tell, however, whether lenders pursue such an approach. As an initial matter, Ramirez has relatively limited applicability at this point, insofar as the decision only covers the trial courts bound by the Appellate Division, Third Department, where the volume of mortgage foreclosure litigation is not as prevalent as in downstate New York.

Whether the principles first articulated in Ramirez can be relied upon by lenders more widely as the basis to commence promissory note enforcement proceedings against borrowers will depend upon whether other departments of the Appellate Division adopt the reasoning of Ramirez.

In particular, if the legal avenues which Ramirez potentially opens up are to gain any traction statewide, Ramirez will need to be adopted by the Appellate Division, Second Department, where the vast majority of mortgage foreclosure litigation has arisen in the wake of the last financial crisis.

The Appellate Division, Second Department will inevitably see both pros and cons in adopting Ramirez. Adopting Ramirez will prevent many borrowers from getting a "free house" — meaning that it will largely prevent borrowers from relying upon the statute of limitations to eradicate mortgage debts, something which those in the lending community have been increasingly critical of in recent years.

On the other hand, Ramirez effectively rewards lenders for their own lack of diligence in not prosecuting mortgage foreclosure actions for a period of years — conceivably decades — by providing a safety net to lenders in the event the mortgage foreclosure litigation cannot be prosecuted to a successful completion. Either way, the financial and public policy implications are substantial for lenders and borrowers alike.

If the other departments of the Appellate Division do not adopt the reasoning of Ramirez, thereby creating a split, it is possible that this is yet another mortgage foreclosure statute of limitations issue that will end up winding its way to the New York Court of Appeals in coming years.

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[1] CitiMortgage Inc. v. Ramirez, --- N.Y.S.3d ----, 2020 NY Slip Op. 07970, 2020 WL 7647749 (3d Dep't Dec. 24, 2020).