FORECLOSURE DISMISSED CAN BE RECOMMENCED BY SUCCESSOR UNDER SAVINGS PROVISION

The Appellate Division of New York, Second Department, recently affirmed the Supreme Court’s determination that a foreclosing bank’s successor in interest can recommence an otherwise time-barred foreclosure action within six months of the initial action being dismissed as abandoned. See Wells Fargo v. Eitani, 2017 WL 507152 (2d Dept. Feb. 8, 2017). In the case, the borrower defaulted on a mortgage in 2005. The mortgagee accelerated the debt and commenced a foreclosure action that same year. Although the mortgagee obtained an order of reference based upon the borrower’s default, it did not obtain a judgment of foreclosure and sale. While the action was pending, the note and mortgage were assigned to the plaintiff bank and the property was sold to the defendant. In 2013, the judge in the foreclosure action issued an order directing dismissal of the action “as abandoned pursuant to CPLR 3215(c), without costs or prejudice.” Three months later, plaintiff commenced the instant foreclosure action and defendant moved to dismiss the complaint on the ground that it was time-barred, arguing that the action was commenced more than eight years after the mortgage was accelerated in 2005. Defendant also argued that plaintiff could not benefit from CPLR 205(a) because it was not the plaintiff in the first action. Plaintiff opposed, arguing that its action is not time-barred because, pursuant to the savings provision of CPLR 205(a), this action was timely “recommenced” within six months of the prior foreclosure action’s dismissal, and that plaintiff was the prior plaintiff’s successor in interest. The Supreme Court concluded that CPLR 205(a) was applicable and thus the action was timely commenced.

On appeal, the Appellate Division affirmed the Supreme Court’s decision. First, it found that the facts in this case meet the requirements of CPLR 205(a) because: (1) there is no dispute that this action would have been timely commenced when the prior action was commenced in 2005; (2) the moving defendant was served within the six-month period after the prior action was dismissed; and (3) this action is based on the same occurrence as the prior action, namely the default on the payment obligations under the note and mortgage. Although CPLR 205(a) does not apply if the prior action was terminated “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 Court rejected defendant’s argument that the dismissal was for neglect to prosecute, stating that the order of dismissal did not include any findings of specific conduct
demonstrating “a general pattern of delay in proceeding with the litigation” and that the action was dismissed “without costs or prejudice.” Second, with regard to the “more novel” question of whether plaintiff could benefit from the savings provision if it was never a plaintiff in the prior action, the Court found that the mortgage company and plaintiff bank share the same interest to enforce the rights under the note and mortgage by obtaining a judgment of foreclosure and sale. Thus, because plaintiff was the successor in interest of the prior plaintiff, it had the right to recommence the action under CPLR 205(a).