GANFER SHORE LEEDS & ZAUDERER LLP

REAL ESTATE TITLE CLIENT ADVISORY

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Ganfer Shore Leeds & Zauderer LLP is pleased to provide you with this edition of our quarterly title newsletter, highlighting recent cases in the fields of title insurance and related real estate litigation. Our real estate title practice group is led by Mark A. Berman, Jason A. Ganfer and Matthew J. Leeds. The firm has recently added four new litigation attorneys, and now has even greater depth in real estate litigation, as well as in our existing commercial litigation and real estate transactional practices. We have recently spoken in various forums on the ever-changing world of cybersecurity and real estate fraud and their impact on the title industry. We are available to present and to advise clients on these and other new developments in the title space.

EXPIRED NOTICE OF PENDENCY MAY NOT BE RE-FILED

CPLR 6513 provides that a notice of pendency is effective for three years from the date of its filing. If a non-foreclosure action's litigation remains pending as such period is ending, the filing party must seek relief before its expiration to extend it for an additional three years. Unlike its initial filing, which may be done by a litigant unilaterally, the extension requires court approval. In *25-35 Bridge St. LLC v. Excel Automotive Tech Center*. Index No. 11088/2003 (Sup. Ct. Kings Co. Jan. 23, 2019), plaintiff's predecessor-in-interest filed its initial notice of pendency in 2003 and the notice of pendency was extended until 2015, when it was allowed to expire. After allowing it to lapse, plaintiff filed a new notice of pendency in 2016. CPLR 6516(c) provides that, except in foreclosure actions, "a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property has been cancelled or had expired…". The court found that the new notice was invalid under the statute. The court rejected plaintiff's attempt to "save" its new notice by contending that it was a proper successive notice based on changed circumstances since the original notice was filed. This case is a reminder that in protracted litigation, litigants and interested parties must keep careful track of the date on which a notice of pendency is due to expire so that a motion to extend it may be filed before the deadline and there is no inadvertent waiver of a party's rights.

LIMITATIONS PERIOD BARRED IMPROPERLY DECELERATED LOAN FORECLOSURE

In *Nationstar Mortg. LLC v. Huang*, Index No. 712312/17 (Sup. Ct. Queens Co. Feb. 5, 2019), the holder of a mortgage on property filed a foreclosure action in September 2017. This was the second foreclosure action as the prior mortgage-holder had initiated an earlier foreclosure action in January 2011. The 2011 action alleged that the borrower had defaulted on the payment of the loan beginning with the payment due in July 2010 and that the mortgagee accelerated the subject mortgage as of January 2011. The 2011 action was discontinued by stipulation in 2012. The current mortgagee moved for summary judgment and the property owner cross-moved to dismiss under the six-year statute of limitations, asserting that the current action was brought more than six years after the debt had been accelerated. Ordinarily, the six-year statute begins to run when each payment is due, but once the entire principal balance has been accelerated, the statute begins to run against the full amount due and the claim becomes time-barred six years later. The court noted that a "plaintiff may affirmatively revoke its election to accelerate a mortgage loan and at some subsequent time accelerate it once again," thereby avoiding the bar of the statute of limitations.

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However here the court found that the stipulation "did not, in itself, constitute an affirmative act to 'revoke its election to accelerate, since, inter alia, the stipulation was silent on the issue of revocation of the election to accelerate and did not otherwise indicate that the plaintiff would accept installment payments from the defendant.'" In other words, not only must a foreclosing plaintiff affirmatively state its intent to "decelerate" its loan, but it must also "reinstate the mortgage and resume sending the borrower monthly bill statements." Lenders should be sure to take this step when an impending foreclosure or a foreclosure action is settled and the intent is to allow the borrower to resume making regular monthly payments. The settlement papers should include "explicit" language indicating that the loan has been decelerated. Moreover, in this particular case, the new complaint still sought default interest from the date of the alleged 2010 default, which demonstrated that the loan had not been reinstated and was relying on the original acceleration date.

LENDER'S FAILURE TO TIMELY PROSECUTE ACTION RESULTS IN ESTOPPEL

A recent court decision dismissed a lender's revived attempt to foreclose on its mortgage where a third party had purchased the mortgaged property at a time that the lender's foreclosure action had been dismissed for lack of prosecution. *LaSalle Bank N.A. v. Daniels*, 2019 NY Slip Op. 50211(U), 2019 N.Y. Misc. LEXIS 669 (Sup. Ct. Kings Co. Jan. 7, 2019). LaSalle Bank had commenced a mortgage foreclosure action against Donna Daniels and others on in May 2008. Although the defendants had defaulted, in September 2013, the court dismissed the action as abandoned due to LaSalle's failure to adequately prosecute its action and to seek a default judgment within one year. In the court's order, LaSalle's notice of pendency was also vacated. LaSalle's six year statute of limitations to foreclose thus apparently expired in May 2014 – after LaSalle's action had been dismissed.

At the same time, a separate, junior lender was pursuing its own foreclosure action and successfully obtained judgment of foreclosure and sale in September 2009. The property was eventually sold to bona fide purchasers, pursuant to a deed dated July 25, 2014 and recorded on August 7, 2014 -- approximately 10 months after LaSalle's action had been dismissed and its notice of pendency vacated and three months after LaSalle's statute of limitations had apparently expired.

Thereafter, in September 2014, LaSalle, without notifying the purchasers, successfully vacated the order dismissing its foreclosure action, thereby restoring such action. The purchasers were granted leave to intervene in LaSalle's action to defend against LaSalle's revived attempt to foreclose on the property that they had purchased believing that LaSalle's mortgage was no longer enforceable. The purchasers moved for summary judgment dismissing the complaint and LaSalle cross-moved for summary judgment.

In its recent decision, the court granted the purchasers' motion for summary judgment dismissing the complaint and denied LaSalle's cross-motion. The court found that the purchasers had "established as a matter of law that plaintiff should be estopped from assertion of rights on the subject property based on the doctrine of laches." The court found that, when the purchaser bought the property, they were justified in believing that LaSalle's mortgage was no longer enforceable because there was no pending foreclosure action or notice of pendency on file, and the statute of limitations had seemingly expired. Thus, "the record establishe[d] that there was no reason to believe that plaintiff could or would attempt to foreclose on the subject mortgage," and the purchasers, who acted in reliance on such record, would be prejudiced if LaSalle were allowed to foreclosure. Accordingly, LaSalle was precluded from foreclosing on its mortgage.

Ganfer Shore Leeds & Zauderer LLP represented the purchasers in this action.