

GANFER SHORE LEEDS & ZAUDERER LLP

REAL ESTATE TITLE CLIENT ADVISORY

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**APPEALS COURT AFFIRMS THAT SECOND POSITION *BONA FIDE*
LENDER FOR VALUE'S MORTGAGE HAD PRIORITY OVER A FIRST POSITION
MORTGAGE THAT WAS DISCHARGED AND SUBSEQUENTLY REINSTATED**

A first recorded mortgage ordinarily has priority over a subsequently recorded one, but exceptional circumstances can occasionally dictate a different result, as occurred in **Bank of New York v. Terrapin Industries LLC**, 2020 N.Y. App. Div. LEXIS 7887, 2020 N.Y. Slip Op. 07705 (1st Dep't Dec. 22, 2020).

Bank of New York ("BNY") commenced a foreclosure action in 2008. It moved for summary judgment of foreclosure, but withdrew that motion in January 2009 and failed to pursue the action for three years. In March 2012, the Clerk of the Court marked the case as disposed. In March 2014, the borrower brought a new action seeking to discharge BNY's mortgage because the statute of limitations had expired. BNY did not respond and, in July 2014, an order discharging its mortgage was entered and recorded.

In February 2015, another lender, KBS gave a mortgage on the property, believing it had a first mortgage because BNY's prior mortgage had been discharged by the court. Two months later, BNY moved to vacate its default in the discharge action. In 2016, the Appellate Division vacated the order discharging BNY's mortgage, and BNY moved to restore its foreclosure action. Meanwhile, KBS brought its own foreclosure action and intervened in BNY's action, with each lender asserting that its mortgage had priority.

The motion court granted summary judgment to KBS, holding that KBS's mortgage had priority. Its holding was based on the doctrine of laches, which is defined as an unreasonable, prejudicial delay in asserting one's rights. BNY appealed, but the appellate court agreed that "the equitable doctrine of laches [applied] to BNY's unreasonable delay in vacating a default judgment discharging its prior mortgage on the same property and in restoring its foreclosure action.... KBS, which closed on its mortgage in February 2015 after investigating and finding no prior valid liens, would be prejudiced by the delay if BNY were deemed to have the superior lien after taking no action, for years, in the foreclosure action or to vacate the default judgment in the [earlier] action."

In addition, KBS was held to be "a bona fide encumbrancer" entitled to protection, because "nothing in the public record created any issues affecting title when KBS entered into its mortgage, notwithstanding BNY's later successful efforts to vacate the default judgment and restore its foreclosure action." In addition, BNY argued that it was only the Extension and Modification

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Agreement (EMA) which was discharged and not the underlying mortgage. However, the Court rejected that argument finding that at all times, BNY treated the EMA and the underlying mortgage as the same lien. Ganfer Shore Leeds & Zauderer represents the successful lender, KBS, in this case.

COURT OF APPEALS HOLDS THAT A LENDER IS NOT REQUIRED TO HAVE PHYSICAL POSSESSION OF NOTE BEFORE FORECLOSING

For many years, it has been a precept of New York foreclosure law that to have standing to foreclose, the lender must have physical possession of the note underlying the mortgage debt and be able to produce the original note in order to obtain a judgment of foreclosure. In two cases decided in December 2020, New York's highest court, the Court of Appeals, relaxed that requirement. The Court explained that a lender must demonstrate that it has standing to foreclose through appropriate evidence, but stressed that "[t]here is no 'checklist' of required proof to establish standing." For example, in one case, the lender established standing by submitting a copy of the endorsed note and "an affidavit of possession based on an employee's review of [the lender's] business records."

The Court specifically stated that "there is no per se rule requiring the court to grant a request for inspection of the original note prior to granting summary judgment in a mortgage foreclosure action." The Court directed that to the extent prior lower-court decisions "have held or suggested otherwise, they should not be followed." This new holding may be particularly significant in cases where a mortgage becomes part of a securitization pool and may change hands from one financial institution to another several times during the lifetime of the loan, and may become lost. The cases are **JPMorgan Chase Bank, N.A. v. Caliguri**, 2020 N.Y. LEXIS 2870, N.Y. Slip Op. 07660, and **US Bank National Association v. Nelson**, 2020 N.Y. LEXIS 2869, 2020 N.Y. Slip Op. 07661, both decided on December 17, 2020.

COURT VACATES AND DISCHARGES MORTGAGE AFTER RULING THE STATUTE OF LIMITATIONS TO FORCLOSE HAS EXPIRED

In New York, the statute of limitations to foreclose on a mortgage is six years from the date of default. This six year statute of limitations runs on each missed payment, but the clock on seeking to recover principal begins to run only once the loan has been accelerated. In **Gravesend LLC v. Wells Fargo Bank**, N.Y. Slip Op. 33725(U) (Sup. Ct. Kings Nov. 5, 2020), Wells Fargo Bank, N.A. ("Wells Fargo") asserted that its mortgage had not been accelerated as a result of the filing of a foreclosure complaint by its predecessor-in-interest more than six years before Wells Fargo had begun its action as no judgment of foreclosure had been issued in the prior action, and that, without a judgement of foreclosure, the right of reinstatement had not been extinguished. However, the motion court disagreed and held that, whether or not a judgment of foreclosure had issued was irrelevant, as it was the filing of the prior action that accelerated the mortgage.

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Additionally, Wells Fargo asserted that a right of reinstatement – that is, the borrower’s right under a mortgage loan to bring the loan current with one payment of all outstanding amounts then due – prevented the statute of limitations from running. However, as the Wells Fargo mortgage did not include a provision providing the borrower with a right of reinstatement as a condition precedent to acceleration, the motion court found this argument unavailing. Thus, the court held that the Wells Fargo mortgage should be discharged and vacated because the statute of limitations had expired. This is yet another case in a long line of recent decisions addressing acceleration. It is critical to pay attention to the wording of the reinstatement provision to determine if it may provide a lender the ability to foreclose a mortgage, which otherwise appears to be subject to discharge, by creating a condition precedent for acceleration.

NEW YORK EXTENDS THE COVID-19 EMERGENCY EVICTION AND FORECLOSURE PREVENTION ACT OF 2020 (S.9114/A.11181)

New York has extended the emergency COVID protections for certain residential tenants, owners and borrowers until May 1, 2021. As it relates to residential borrowers, the act keeps in place a moratorium on residential foreclosure proceedings until May 1st for homeowners and small landlords which own 10 or fewer residential dwellings. To qualify, a borrower must file a hardship declaration with their mortgage lender or the party conducting the foreclosure on the lender’s behalf.

With respect to tax lien sales, the act similarly prevents local governments from engaging in a tax lien sale or a tax foreclosure until May 1, 2021.

The act does not provide for debt forgiveness or extension and payments are still due and are subject to interest, fees and penalties, as they would be due in the normal course. Given the changing state of the world, it is possible that the act will be further extended; several advocacy groups and lawmakers are presently eyeing an extension until at least January 1, 2022.