

# BANKING ALERT

February 2024

## **New York Appellate Division Refuses to Toll Accrual of Interest in Foreclosure Action Due to Delays**

In *Deutsche Bank National Trust Co. v. Fresh*, 2024 NY Slip Op 00453 (1st Dep't Feb. 2, 2024), the First Department affirmed a Referee's report that awarded a lender seven years' worth of interest that accrued during the pendency of the foreclosure action.

After judgment of foreclosure was entered on behalf of the lender, Deutsch Bank National Trust Co. ("Plaintiff"), a Referee was appointed to compute the amount due and owing under the loan documents. In coming to an award, the Referee awarded Plaintiff interest from May 4, 2015 through the date of the award, August 8, 2022, at a rate of 7.625%. Doug E. Fresh, the administrator of the borrower's estate ("Defendant"), opposed the award, claiming that a tolling of interest was warranted due to delays on the part of Plaintiff in prosecuting the action. Defendant's motion with the trial court seeking to vacate the award of interest was denied. While the trial court found that Plaintiff was responsible for certain delays in the prosecution of the action before May 2015, the delays after that time were not caused by Plaintiff and, in fact, were caused by Defendant's opposition to a motion to substitute himself as a defendant after the borrower passed away during the pendency of the action.

The First Department agreed with the trial court's reasoning and found that tolling under the relevant case law was not warranted because there was no action taken by Plaintiff that unnecessarily delayed prosecution of the matter.

## **New York Appellate Division Finds That Foreclosure Action is Time-Barred After Voluntary Discontinuance of First Action**

In *HSBC Bank USA, N.A. v. Corrales*, 2024 NY Slip Op 00895 (2d Dep't February 21, 2024), the Second Department reversed a trial court's order denying the defendant's motion to dismiss a lender's foreclosure complaint as time-barred.

The defendant, Astrid Corrales ("Defendant"), borrowed \$600,000 secured by a mortgage on real property located in Queens, New

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York in April 2007. In May 2009, the plaintiff's predecessor in interest commenced a foreclosure action to foreclose on the mortgage but, in July 2014, voluntarily discontinued the action. In April 2016, the plaintiff and new holder of the note and mortgage, HSBC Bank USA, N.A. ("Plaintiff"), commenced a foreclosure action. In her answer, Defendant asserted as an affirmative defense the statute of limitations. Thereafter, Defendant filed a motion to dismiss the action as time-barred, which was denied by the trial court.

On appeal, the Second Department noted that an action to foreclose a mortgage is governed by a six-year statute of limitations and, where the debt is accelerated, the entire balance of the debt accrues and the statute of limitations begins to run on the full amount due. Defendant had argued and demonstrated that the statute of limitations began to run in May 2009 when the first action was filed and, as a result, the second-filed action in April 2016 was time-barred.

In finding that the trial court erred in denying Defendant's motion, the Second Department rejected Plaintiff's contention that the voluntary discontinuance revoked the acceleration of the mortgage debt based on the Foreclosure Abuse Prevention Act which states, among other things, that "the voluntary discontinuance of such action...shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or rest the limitations period..." The Second Department also rejected Plaintiff's argument that Plaintiff's mailing of mortgage statements after the 2009 discontinuance de-accelerated the mortgage debt, relying again on the Foreclosure Abuse Prevention Act, which states that no party may unilaterally extend, toll, or revive the statute of limitations.

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