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COURT OF APPEALS
STATE OF NEW YORK

GREGG LUBONTY,

Appellant,

-against-

U.S. BANK NATIONAL ASSOCIATION,

NO. 85

Respondent.

20 Eagle Street
Albany, New York
October 17, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 85, Lubonty v. U.S.
3 Bank National Association.

4 Good afternoon, Counsel.

5 MR. KAMRAN: May it please the court, good
6 afternoon. It's Peter Kamran, Lester & Associates, for the
7 appellant, Gregg Lubonty. I would like to reserve three
8 minutes for my - - -

9 CHIEF JUDGE DIFIORE: Of course.

10 MR. KAMRAN: - - - rebuttal. Thank you, Your
11 Honor.

12 This appeal concerns the interpretation of CPLR
13 204(a), which is the - - - the tolling statute. 204(a)
14 says when the commencement - - -

15 JUDGE GARCIA: Counsel - - - Counsel, how would
16 you - - - we know - - - we know the statute, but how would
17 you apply that statute? So what would your rule be, when
18 looking at the next case? What would your rule be on
19 application of these two statutes, the bankruptcy toll and
20 our CPLR stay?

21 MR. KAMRAN: Well, the way the statute is
22 written, if - - - if an action has already been commenced -
23 - - a foreclosure action or - - - or whatever action, and a
24 bankruptcy is filed, the commencement was not stayed by the
25 - - - by the bankruptcy stay or any other stay.



1 JUDGE GARCIA: So no time would be excluded,
2 what, forever? For the length of the underlying
3 foreclosure action in this case? What would your rule be?
4 What would you deduct from the period of this stay?

5 MR. KAMRAN: I wouldn't deduct anything. The
6 Section 108 of the Bankruptcy Code provides a - - - a
7 savings clause in - - - in just that event that says thirty
8 days after - - - after the - - -

9 JUDGE GARCIA: Sure, the Bankruptcy Code has its
10 own stay, but that and the history of that stay says you
11 look also to the state law. So I think the bankruptcy stay
12 is - - - is not particularly relevant here. So let's go to
13 the CPLR and the bankruptcy provision, that says, you know,
14 these are stayed - - - continuation is stayed. You have
15 this case with these stays; why do you not count, under
16 your rule, how do you apply it? Is it for the time where
17 the first two foreclosure actions were pending? So let's
18 say, instead of the facts we have here, in the first
19 foreclosure action, it's dismissed within a month, but the
20 bankruptcy stay goes on. Would that count?

21 MR. KAMRAN: I - - - I'm not sure I understand.
22 When you say it's dismissed within a month - - -

23 JUDGE GARCIA: But the - - - the foreclosure
24 action is dismissed, right? It's gone.

25 MR. KAMRAN: Prior to the bankruptcy filing?



1 JUDGE GARCIA: The bankruptcy stay is still in
2 effect, let's say for three more years. Does that count
3 for the next time you commence a foreclosure action?

4 MR. KAMRAN: But was the foreclosure dismissed
5 while the bankruptcy stay was in effect?

6 JUDGE GARCIA: Yes.

7 MR. KAMRAN: I - - - I don't see how that could
8 happen.

9 JUDGE GARCIA: So no - - - no toll for any of the
10 period of that bankruptcy filing?

11 MR. KAMRAN: No, not at all.

12 JUDGE STEIN: So what you're saying is, is that
13 there couldn't be proceedings in the foreclosure action to
14 effectuate a dismissal while the bankruptcy stay was
15 pending; is that - - - is that what you're saying?

16 MR. KAMRAN: Correct, Your Honor.

17 JUDGE STEIN: Could - - - could - - -

18 MR. KAMRAN: The bank would have to lift the
19 stay.

20 JUDGE STEIN: Could the - - - the bank that's
21 foreclosing go to the bankruptcy court and say, would you
22 just let us resolve - - - would you effectively stay the
23 stay, so that we could resolve this issue?

24 MR. KAMRAN: Banks always make motions to lift
25 stay in fore - - - in bankruptcy court - - -



1 JUDGE STEIN: Lifting stay, yes.

2 MR. KAMRAN: - - - and to proceed with a
3 foreclosure. That's exactly what you want.

4 JUDGE GARCIA: So that's the point. So you would
5 have the foreclosure action. It's stayed. So as long as
6 that bankruptcy stay is in - - - in effect, it's - - -
7 you're kind of in limbo, because you can't dismiss; you
8 can't do anything.

9 MR. KAMRAN: But both parties are in limbo, yes.

10 JUDGE GARCIA: Then it li - - - well - - - it
11 lifts, and then that motion in the first foreclosure is
12 dismissed. So now if you're going to refile under your
13 theory, the second foreclosure action, you've got no period
14 of stay that you can take advantage of.

15 MR. KAMRAN: Correct, Your Honor.

16 JUDGE STEIN: But you have CPLR 205, and - - -
17 and also you can ask for additional time to serve under - - -
18 -

19 MR. KAMRAN: Correct, that was our argument.

20 JUDGE STEIN: - - - 306.

21 MR. KAMRAN: If - - - there are carveouts in 205,
22 and one of them is lack of personal jurisdiction, which is
23 relevant - - -

24 JUDGE GARCIA: What if I had a fraud claim from
25 the same transaction, but I hadn't brought it, and now,



1 this happens - - - both these things happen. But instead
2 of filing a foreclosure action in December '17, or whatever
3 it is, I file a fraud claim. Do I get a toll?

4 MR. KAMRAN: For a fraud claim? I - - - I don't
5 see why not.

6 JUDGE GARCIA: So it's not a could-have-brought
7 type of thing. It's not a subject matter test.

8 MR. KAMRAN: Not at all, Your Honor. I think if
9 - - - if there's a different cause of action that's brought
10 - - -

11 JUDGE GARCIA: Even related to the same
12 underlying facts. So instead of a contract, I have a
13 fraud.

14 MR. KAMRAN: I - - -

15 JUDGE GARCIA: So what would the purpose of not
16 counting the tolls on the other one be then?

17 MR. KAMRAN: Well, if - - - if you're bringing a
18 fraud claim, it's - - - and it's based on the same - - -
19 the same, I guess, the - - - it would be on the obtaining
20 of the mortgage.

21 JUDGE GARCIA: Right.

22 MR. KAMRAN: That's different than a default on a
23 mortgage. It's a completely different cause of action.
24 And it's actually not, I think, based on the same - - - the
25 same facts.



1 JUDGE GARCIA: So you'd have to have some kind of
2 test on how related it was to the original cause of action?

3 MR. KAMRAN: I - - - I would think that would
4 obviously have to be done be - - - I haven't seen that
5 happen, myself, but - - -

6 JUDGE FAHEY: Well, is there - - - is there any
7 basis for that in the statute? Because what I struggle
8 with with your claim is that service is - - - it's - - -
9 it's the second time around. The foreclosure service is
10 improper on the second time. It's thrown out, and so
11 there's an anticipated third action that isn't brought, and
12 isn't - - - the - - - the commencement provision of 204,
13 doesn't it work the same against the first time you bring
14 it as the third time you bring it? It's still the same
15 cause of action. And you seem to be saying, no, that we
16 have to look behind commencement to see what the cause of
17 action is, to determine whether or not it would count.

18 MR. KAMRAN: That's in the case. If it was a
19 different - - - this is a mortgage foreclosure action.

20 JUDGE FAHEY: Right.

21 MR. KAMRAN: The - - - all these - - -

22 JUDGE FAHEY: Right, right, right, right.

23 MR. KAMRAN: - - - and that would be a fraud
24 action. If - - -

25 JUDGE FAHEY: So do we have to look behind the



1 cause of - - - behind the - - - just commencement of any
2 action, or does it - - - do we have to look to say, no,
3 here the bankruptcy stay apply - - - stay applies in a 204;
4 here it doesn't?

5 MR. KAMRAN: I - - - I think you would have to
6 look behind, if there were - - -

7 JUDGE FAHEY: So state law then would pick and
8 choose between which ones could go forward to the
9 bankruptcy?

10 MR. KAMRAN: What do you mean? I'm sorry.

11 JUDGE FAHEY: Between a fraud, say, and a
12 foreclosure action.

13 MR. KAMRAN: I - - - well, if they were both
14 brought at the same time, the same - - - the same test
15 would - - - would apply to both of them, or the same rule
16 would apply. But if instead of the third action being a
17 foreclosure action, it was a fraud action, you'd have to
18 look at it to see if that - - - those circumstances - - -

19 JUDGE FAHEY: Maybe my question isn't clear. You
20 understand on the third action, assume that it's a
21 foreclosure action, all right? On that third action,
22 you're saying they can't bring it, right?

23 MR. KAMRAN: Yes.

24 JUDGE FAHEY: All right, okay. So I'm saying to
25 you, they've already brought it twice. What's the



1 different - - - and - - - and the foreclosure - - - and the
2 stay would have treated those other ones differently,
3 right?

4 MR. KAMRAN: Yes.

5 JUDGE FAHEY: All right. So what's the
6 difference between this one and those previous actions?

7 MR. KAMRAN: This new one being - - -

8 JUDGE FAHEY: Right.

9 MR. KAMRAN: - - - the foreclosure action?

10 JUDGE FAHEY: Right.

11 MR. KAMRAN: It's past the statute of
12 limitations. The - - - the tolling didn't apply to the
13 first two. So as soon as the second bankruptcy was - - -
14 was - - - was dismissed or that the stay was lifted in the
15 second bankruptcy in November of 2013, the statute of
16 limitations ran. Maybe there was thirty days after it, but
17 the second foreclosure wasn't dismissed until the next
18 year. Once that - - - once that foreclosure was dismissed,
19 the six years had run.

20 JUDGE GARCIA: But isn't this a particularly bad
21 toll to apply your rule to, because again, as we were
22 discussing earlier, you can't even dismiss your action. I
23 mean, you could go to the bankruptcy judge, but you can't
24 go into a New York court and say, I want to dismiss this
25 action, and then, you know, I would get the toll, because I



1 realize there's a problem here. I'm stuck, I'm in limbo,
2 and this time is ticking off the clock. But it's not
3 counting as - - - as part of the toll; it's counting as
4 part of the statute of limitations.

5 So for this one, it's kind of a particularly bad
6 one it seems.

7 MR. KAMRAN: With respect to this case, I don't
8 think it is, though. Prior to the second bankruptcy, the -
9 - - the appellant had filed a motion to dismiss based on
10 lack of service. That motion was stayed for approximately
11 two and a half years. They had plenty of time to look at
12 it and see what they wanted to do with it.

13 JUDGE GARCIA: But what could they do then? I
14 mean, again, putting aside going to the bankruptcy court,
15 what could they do in that New York action at that point,
16 even if they realize service is bad. What could they do?

17 MR. KAMRAN: If they realize service was bad or
18 that they had an issue, they could have made a motion to
19 lift the stay and fix - - -

20 JUDGE GARCIA: To the bankruptcy court.

21 MR. KAMRAN: Yes, and - - - and fix or try to fix
22 whatever they wanted to fix. What they did afterwards was
23 - - - was decide to fight it out on service - - -

24 JUDGE RIVERA: And - - - and if the court - - -

25 JUDGE STEIN: Or they - - -



1 JUDGE RIVERA: - - - and if the court didn't
2 grant - - - if the bankruptcy court didn't grant that
3 motion, is there anything else under New York law, that
4 they could do?

5 MR. KAMRAN: Under New York law? I don't believe
6 they could have voluntarily discontinued - - -

7 JUDGE STEIN: But could have - - - could they
8 have moved under 306(b) for additional time to serve?

9 MR. KAMRAN: After the stay had lifted - - -

10 JUDGE STEIN: Uh-huh.

11 MR. KAMRAN: - - - been lifted?

12 JUDGE STEIN: Yeah.

13 MR. KAMRAN: Yes, of course.

14 JUDGE RIVERA: How much time was left after the
15 stay was lifted?

16 MR. KAMRAN: Of the 120 days to serve, I think
17 they were at 136, if you take out the bankruptcy time. I
18 think that motion would have been granted, almost as a
19 matter of course.

20 JUDGE RIVERA: They certainly had enough time to
21 think about it.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 MR. KAMRAN: That's my argument.

24 Thank you.

25 CHIEF JUDGE DIFIORE: Counsel?



1 MR. KRAUS: May it please the court, Schuyler
2 Kraus for the respondent, U.S. Bank National Association,
3 as trustee.

4 JUDGE RIVERA: So why isn't he correct that you -
5 - - you did have an opportunity under New York law to avoid
6 these harsh consequences by, at a minimum, seeking - - - or
7 - - - or putting in a motion to extend the time to serve.

8 MR. KRAUS: Well, I - - - I dis - - -

9 JUDGE RIVERA: Proper service.

10 MR. KRAUS: I dis -- - I disagree with the
11 proposition. Under 306(b) - - -

12 JUDGE RIVERA: What part of the proposition?

13 MR. KRAUS: Well, the - - - the entire
14 proposition actually, Your Honor.

15 JUDGE RIVERA: Okay.

16 MR. KRAUS: Because under 306(b), first of all,
17 you need to make that application within the time frame of
18 the 120 days from the beginning - - -

19 JUDGE RIVERA: Within the 120, not outside?

20 MR. KRAUS: Correct. Secondarily, there had been
21 no determination that service was improper. It was unclear
22 what needed to be fixed, perhaps. And you can come up with
23 a variety of examples as to why that rule wouldn't work.
24 In fact, in his case, the motion was made. The appellant
25 was served with process. Three weeks later, he files a



1 motion. Within two weeks - - - within days, he files
2 bankruptcy. It is not until the bankruptcy is dismissed
3 that then motion practice continues. Then - - -

4 JUDGE RIVERA: Sure, because you've got the stay
5 in place.

6 MR. KRAUS: Right, and so there's no - - -

7 JUDGE RIVERA: Well, you certainly had enough
8 time to think about the motion that there was not proper
9 service to determine whether or not there was proper
10 service, correct?

11 MR. KRAUS: Certainly, it is - - - you have time
12 to think about the issue and the motion that's made, but
13 there - - - there could be many factual circumstances which
14 would - - - which would prevent you from be - - - from
15 determining the risk on going forward or - - - or having a
16 motion.

17 JUDGE FAHEY: What - - - I guess what I struggle
18 with in - - - in your case is, I - - - I count five options
19 that U.S. Bank would have had and I - - - the first one
20 would have been, you could have moved for relief from the
21 bankruptcy stay in order to settle the personal
22 jurisdiction issue when the issue arose. Second, you could
23 have moved for an extension of time, to serve process for
24 306(b). Third, you could have moved to reopen the
25 bankruptcy proceeding itself. Fourth, you could have moved



1 to commence a new action to the thirty-day window. I think
2 it's 11 U.S.C. 108(c)(2).

3 And of course, you could have served Lubonty
4 correctly in the first place, which would have been easier
5 for everybody, probably.

6 JUDGE FEINMAN: Other than that last one, are all
7 those options available while the stay is in place?

8 MR. KRAUS: Are all the - - - those options
9 available - - - I mean - - -

10 JUDGE FEINMAN: What just - - - that he's just
11 listed.

12 MR. KRAUS: An application can certainly be made
13 to the bankruptcy court, whether or not it's granted.

14 JUDGE FEINMAN: So it all depends on what the
15 bankruptcy court does?

16 MR. KRAUS: Correct. And in terms of - - -

17 JUDGE FAHEY: But that that's - - - in a
18 situation like this, that - - - that - - - that doesn't
19 seem unusual. I - - - I mean, to the point where the
20 petitioner had been castigated by one of the courts as
21 using the stay as a sword rather than a shield, it seems to
22 me that it would have been quite easy to make an interest
23 of justice argument here.

24 MR. KRAUS: Under 306(b)?

25 JUDGE FAHEY: Yeah.



1 MR. KRAUS: Well, I - - - I understand, Your
2 Honor. I - - - I think alternatively, I - - - a litigant
3 should be allowed to rest on their proof, and - - - and
4 given the benefit of a statute of limitations and determine
5 at some point, we believe that service was proper, and if
6 it is determined to be improper or ineffectual, then we
7 will have enough time to then serve and correct. And here,
8 a six-year statute of limitations, because of these
9 bankruptcy filings was reduced from six years to really a
10 year and a half.

11 And - - - and to the point of the witness and the
12 last point you raised, Your Honor - - -

13 JUDGE RIVERA: So you want another four and a
14 half years; is that what you're saying?

15 MR. KRAUS: Pardon me?

16 JUDGE RIVERA: You want another four and a half
17 years - - -

18 MR. KRAUS: Well, I think he should - - -

19 JUDGE RIVERA: - - - after the stay was lifted?

20 MR. KRAUS: Our - - - our position, Your Honor,
21 is that the respondent in this case should be given, and
22 was given according to the Second Department, the credit
23 for the amount of time that they were prevented from either
24 continuing or commencing.

25 JUDGE STEIN: But it seems to me that your



1 argument is based on what you think is an unfair result in
2 this case. And that's not generally how we make law. And
3 here, we're interpreting a statute. And we have to look at
4 the language of the statute, and the language talks about
5 commencement. And the other thing that we have to look at,
6 when it's not entirely clear, maybe there are - - - I'm not
7 - - - I'm not conceding that there's ambiguity, but let's
8 assume there is some ambiguity - - - let's look at the
9 context; let's look at the whole statutory scheme. And
10 here, you have these other pieces.

11 I mean, to me, 205 says that the legislature
12 realized that sometimes when you get dismissed for lack of
13 personal jurisdiction, you know, you're going to be out of
14 luck. But it - - - it - - - it provided that - - - that
15 avenue. It provided 306(b). It pro - - - you know, there
16 are just so many ways that this could have been avoided,
17 that I'm not sure how we as a court, as opposed to what the
18 legislature might want to do, gets to read this statute, in
19 a way that there's no indication that it was intended to
20 apply.

21 MR. KRAUS: Two - - -

22 JUDGE STEIN: It says commencement.

23 MR. KRAUS: Two points.

24 JUDGE STEIN: Right?

25 MR. KRAUS: And - - - and to that last point,



1 Your Honor. Actually, I believe that it could be read, 362
2 pro - - - provides that there is a stay from continuation
3 and from commencement. And so if you - - - if you look - -
4 - that's the Bankruptcy Code, right? You're not allowed to
5 commence or continue and - - - and a variety of other
6 actions, by creditors against a debtor.

7 So if you look at 204(a), 204(a) if you're
8 reading the - - - the - - - the text of it, and just
9 applying the words as they appear, the statutory
10 prohibition under 204(a) is 362. And 362 says you cannot
11 commence, as well as other actions. And so I think it
12 could be read that - - - that the statutory prohibition
13 that triggers 204 here does prevent commencement.

14 Now, it's irrespective, I would argue, on whether
15 or not an action has previously been commenced or is
16 currently pending. The statute that triggered 204(a)
17 prevented commencement. We could not con - - - we could
18 not dismiss without permission of the court - - -

19 JUDGE STEIN: But it was already - - -

20 MR. KRAUS: - - - and we could not recommence.

21 JUDGE STEIN: It was already commenced. So that
22 - - - that's where I think maybe the ambiguity comes in,
23 and - - - and the - - - the legislature could have said
24 commencement or continuation. It didn't say that. It said
25 commencement.



1 MR. KRAUS: If I may - - -

2 JUDGE RIVERA: But I thought - - - I thought in
3 part your response to many of the questions that Judge
4 Stein was asking and the question I asked before is that
5 there is not another provision of the CPLR that would have
6 prevented this harsh result. That there is nothing you
7 could have done, other than, of course, as Judge Fahey's
8 already pointed out, as your adversary points out, serve
9 properly to begin with. Put that aside for the moment.

10 MR. KRAUS: Well - - -

11 JUDGE RIVERA: Am I misunderstanding you?

12 MR. KRAUS: I - - - I - - - that is - - -

13 JUDGE RIVERA: That - - - that - - - that these
14 other provisions were just simply not available to you - -
15 -

16 MR. KRAUS: Or - - -

17 JUDGE RIVERA: - - - even though he's pointed to
18 them.

19 MR. KRAUS: And - - - correct, Your Honor. And -
20 - - and if I may just on the two - - -

21 JUDGE RIVERA: Is there - - - is there - - - was
22 there any equitable argument you could have made?

23 MR. KRAUS: At - - - at - - -

24 JUDGE RIVERA: Equitable tolling? Anything - - -

25 MR. KRAUS: Equitable tolling, below?



1 JUDGE RIVERA: If you - - - if your position is,
2 we thought we properly served, until the court told us
3 otherwise; we see no need to make a motion. And - - - and
4 in any event, by the time the stay is lifted, we can't
5 proceed under any of these provisions.

6 MR. KRAUS: If - - - if the rule is that you do
7 not get any tolling credit because you, as a claimant,
8 actively sought to pursue your claim, and you're punished
9 by the fact that a bankruptcy followed, then I'm not sure
10 what the equitable tolling would be, if - - - if - - -
11 because then - - -

12 JUDGE RIVERA: Well, the argument it's just
13 unfair, because you could not, right?

14 MR. KRAUS: Well - - -

15 JUDGE RIVERA: The - - - the - - - it's the
16 argument I thought you were trying to make - - -

17 MR. KRAUS: Right - - -

18 JUDGE RIVERA: - - - which is there is no other
19 provision that addresses this particular situation - - -
20 put aside your arguments that you think he was gaming the
21 system - - - that there's nothing else that addresses this.
22 When you've got the stay, you can't act in the state action
23 - - -

24 MR. KRAUS: Cor - - - correct.

25 JUDGE RIVERA: - - - even if you went to federal



1 court. Let's say they turned down your motion; they
2 rejected the motion, denied it. You're stuck; no other
3 provision applied.

4 MR. KRAUS: I - - - I misunderstood your question
5 previously; I apologize.

6 JUDGE RIVERA: I could understand how you would
7 misunderstand. It's okay.

8 MR. KRAUS: I agree with that proposition that
9 yes, there is no - - - there is no - - - it would be
10 inequitable, and it is inequitable. And if - - - if I may
11 just address it.

12 JUDGE RIVERA: You did not seek to make any of
13 those arguments to in state court - - -

14 MR. KRAUS: Those are - - -

15 JUDGE RIVERA: - - - correct?

16 MR. KRAUS: Those are not in the record, no.

17 JUDGE RIVERA: And you did not raise that here?

18 MR. KRAUS: That - - - that it would be
19 inequitable? I believe we have raised - - -

20 JUDGE RIVERA: Well, no, that there might be some
21 type of equitable relief.

22 JUDGE WILSON: Let me ask you this. While your -
23 - - your foreclosure action is pending, is there anything
24 in the CPLR that prevents you from filing an identical
25 action?

1 MR. KRAUS: Yes.

2 JUDGE WILSON: What?

3 MR. KRAUS: And - - - and that's actually - - -
4 it was pointed out in the reply brief that 3211 suggests
5 that you could have another action. In a for - - - in a
6 foreclosure context, you cannot. RPA PL 1301 prevents you
7 from filing a second action.

8 If I - - - if I may just address the 205 argument
9 and issue? Yes, under a service - - - service is the
10 issue. We've - - - we've discussed why there is a carveout
11 for that and perhaps 306(b) could be a remedy. However,
12 voluntary discontinuance is also one of the carveouts, and
13 I don't think it would be difficult for the court to come
14 up with various circumstances where it would not only be
15 inequitable, but it would also be counter to the
16 administration of justice, and - - - and overwhelm the
17 courts. You could - - -

18 JUDGE STEIN: I - - - I guess what - - - what I -
19 - - my point there was, that the legislature did create
20 these carveouts, but we have to presume they knew what they
21 were doing, so that it wasn't intended to give a break in
22 this particular situation. But - - - but as Judge Fahey
23 has indicated, there may have been other remedies.

24 MR. KRAUS: And for a voluntary discontinuance if
25 there - - - let's say, predicate notices - - - there's some



1 issue as to whether or not they were served, or an issue of
 2 fact. You could file an action. You could believe that
 3 you properly sent those to the right address. A bankruptcy
 4 could be filed. You could realize after the bankruptcy
 5 that goes on for years, and exhausts your statute of
 6 limitations, that the - - - that predicate notice, there's
 7 an issue there, and that you should not be proceeding.

8 However, in - - - in this circumstance, if this
 9 is the rule, then a plaintiff will have to proceed, because
 10 you'll have to proceed and then lose on the merits as to
 11 the predicate notices. And then you could recommence under
 12 205(a). But if you voluntarily discontinued, you would be
 13 carved out and it would be inequitable.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. KRAUS: Thank you very much.

16 CHIEF JUDGE DIFIORE: Counsel?

17 MR. KAMRAN: Just briefly. With regards to the
 18 306(b), and - - - and there's a motion to dismiss based on
 19 lack of jurisdiction, which was pending, when the ba - - -
 20 bankruptcy was filed. They knew how they had allegedly
 21 served the - - - the defendant, and at which property. All
 22 during the bankruptcy, which respondent had participated
 23 in, it was clear what - - - what appellant's address was,
 24 his correct address.

25 They had plenty of time to plan on what - - -



1 what they wanted to do. And there is no - - - there is no
2 guarantee that the bankruptcy court would have granted a
3 motion - - -

4 JUDGE RIVERA: So what - - - what could they have
5 done, because there's a stay. Is it that they could only
6 go to the bankruptcy court and say, lift the stay, period,
7 or, let us serve. Could they ask the bankruptcy court if
8 they could serve properly?

9 MR. KAMRAN: That would essentially be the same
10 motion. If they wanted to lift the stay - - -

11 JUDGE RIVERA: There's one thing to lift the stay
12 completely and let the proceeding proceed, versus just to
13 allow service?

14 MR. KAMRAN: I think if they made a motion to
15 lift the stay just to allow service, I don't see any way
16 that we could have opposed that. I - - - I think the
17 bankruptcy court would have granted that. If it was to
18 lift the stay as to the whole foreclosure action, it could
19 have been opposed, but there's no - - - there's no dispute
20 that the - - - the appellant had not made any payments at
21 all. So there are numerous grounds to lift the stay. I
22 think a motion would have been granted. There's no
23 guarantee on that, though.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 MR. KAMRAN: Thank you.



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(Court is adjourned)



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Gregg Lubonty v. U.S. Bank National Association, No. 85 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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