

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 25-00103

PRESENT: WHALEN, P.J., CURRAN, SMITH, OGDEN, AND HANNAH, JJ.

MCLP ASSET COMPANY, INC., PLAINTIFF-APPELLANT.

V

MEMORANDUM AND ORDER

SEEMA A. ZAVERI, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

FRIEDMAN VARTOLO LLP, GARDEN CITY (STEPHEN J. VARGAS OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., GENEVA (ELIZABETH G. ADYMY
OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Ontario County (Craig J. Doran, J.), entered November 5, 2024. The order and judgment denied the motion of plaintiff for, inter alia, summary judgment and granted summary judgment to defendant dismissing the complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: In 2012, a predecessor in interest of plaintiff MCLP Asset Company, Inc. (MCLP) commenced a residential foreclosure action against defendant, among others (2012 action). That action remained dormant and, on March 2, 2016, it was "pre-marked off" Supreme Court's calendar in a clerk's minute entry. On March 2, 2017, pursuant to CPLR 3404, the action was deemed abandoned and was dismissed. The predecessor in interest appealed from the denial of its subsequent motion to vacate the dismissal and restore the 2012 action to the calendar, but the appeal was dismissed on November 30, 2018, for failure to perfect (*see* 22 NYCRR 1250.10 [a]).

Another of MCLP's predecessors in interest, MTGLQ Investors, LP (MTGLQ), commenced the instant foreclosure action on April 2, 2019. Subsequently, defendant moved for, inter alia, summary judgment dismissing the complaint as time-barred. The court granted the motion and dismissed the complaint. On appeal to this Court, we reversed that order and judgment insofar as appealed from and reinstated the complaint, concluding that the 2019 action was not time-barred inasmuch as CPLR 205 (a) applied to extend the statute of limitations (*MTGLQ Invs., LP v Zaveri*, 210 AD3d 1387, 1388-1389 [4th Dept 2022]). It is undisputed that, absent the application of the extension found in CPLR 205 (a), this action would be untimely.

Shortly after we decided the prior appeal, the legislature enacted the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff. Dec. 30, 2022]). FAPA applies "to all actions commenced on an instrument described under [CPLR 213 (4)] in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821, § 10). CPLR 213 (4) applies to, inter alia, actions "upon a mortgage of real property," such as this one. As relevant to this appeal, FAPA amended CPLR 205 to provide that "[t]his section . . . shall not apply to any proceeding governed by [CPLR 205-a]" (CPLR 205 [c], as amended by L 2022, ch 821, § 5). CPLR 205-a, enacted as part of FAPA, provides, in relevant part, that "[i]f an action upon an instrument described under [CPLR 213 (4)] is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for any form of neglect, including, but not limited to those specified in . . . [CPLR 3404,] . . . the original plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination."

Following the reinstatement of the complaint by this Court, MTGLQ assigned the mortgage to MCLP. MCLP then moved for, among other things, summary judgment on the complaint and to be substituted as plaintiff following MTGLQ's assignment of the mortgage. Defendant cross-moved for leave to amend the answer to assert affirmative defenses alleging that the action is time-barred in light of FAPA's amendment of CPLR 205 and enactment of CPLR 205-a. The court granted the cross-motion and that part of MCLP's motion seeking substitution and adjourned argument on the remainder of the motion to a later date. Following further argument, the court concluded that FAPA was intended to apply retroactively, relying on decisions to that effect issued by the First and Second Departments. It further concluded that MCLP had not met its burden of showing that the retroactive application of FAPA was an unconstitutional deprivation of its right to due process. The court thus denied the remainder of the motion and, upon searching the record pursuant to CPLR 3212 (b), granted summary judgment in favor of defendant, dismissing the complaint as time-barred. MCLP appeals.

MCLP contends that the court erred in concluding that FAPA, particularly CPLR 205-a, applies retroactively. We reject that contention. "Statutes are generally applied prospectively in the absence of express or necessarily implied language allowing retroactive effect" (*Dorfman v Leidner*, 76 NY2d 956, 959 [1990]). "[R]etroactive operation is not favored by the courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 584 [1998]; see *Gottwald v Sebert*, 40 NY3d 240, 258 [2023]). "However, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose" (*Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122 [2001]). Factors to consider in determining whether a statute should be applied retroactively include, "whether the [l]egislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial

interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be" (*id.*).

We agree with the First, Second, and Third Departments, all of which have concluded that "the [l]egislature's goal, expressed in the language of FAPA and its legislative history, was to see FAPA applied retroactively" (*Genovese v Nationstar Mtge. LLC*, 223 AD3d 37, 45 [1st Dept 2023]; see *FV-1, Inc. v Palaguachi*, 234 AD3d 818, 821-822 [2d Dept 2025]; *Bank of N.Y. Mellon v Richards*, 233 AD3d 1250, 1251-1252 [3d Dept 2024]). The legislature has stated that FAPA "shall take effect immediately" (L 2022, ch 821, § 10), which, although "not alone determinative, . . . does evince[] a sense of urgency" (*Brothers v Florence*, 95 NY2d 290, 299 [2000] [internal quotation marks omitted]). Additionally, as noted above, the legislature further stated that FAPA applies to all foreclosure actions "in which a final judgment of foreclosure and sale has not been enforced" (L 2022, ch 821, § 10), which would necessarily give FAPA retroactive effect (see *Genovese*, 223 AD3d at 44).

It also is undisputed that the legislature enacted FAPA to overrule prior judicial interpretations that it concluded were erroneous (see Assembly Mem in Support, Bill Jacket, L 2022, ch 821 at 8; Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 821 at 98). Indeed, the legislature specifically found that there was "an ongoing problem with abuses of the judicial foreclosure process and lenders' attempts to manipulate statutes of limitations; that the problem has been exacerbated by recent court decisions which, contrary to the intent of the legislature, have given mortgage lenders and loan servicers opportunities to avoid strict compliance with remedial statutes and manipulate statutes of limitation to their advantage; and that the purpose of the present legislation is to clarify the meaning of existing statutes, and to rectify these erroneous judicial interpretations thereof" (Assembly Mem in Support, Bill Jacket, L 2022, ch 821 at 8; see Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 821 at 98). Thus, the legislative history shows that the purpose of FAPA was to "clarify what the law was always meant to say and do" (*Majewski*, 91 NY2d at 585) and to "remediate the impact of" prior court decisions (*Brothers*, 95 NY2d at 300).

With respect to CPLR 205-a in particular, we note that, in drafting that provision, which was modeled on CPLR 205 (a), the legislature did not include the CPLR 205 (a) language "requiring that the court set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation . . . , which had occasioned erroneous judicial interpretations that the court's recitation of the specific conduct . . . is a condition precedent to the bar against an extension of the statute of limitations for a neglect based dismissal" (*Deutsche Bank Natl. Trust Co. v Vista Holding, LLC*, 239 AD3d 830, 833 [2d Dept 2025] [internal quotation marks omitted]). Indeed the legislative history makes clear that in omitting the aforementioned language, the legislature intended to correct those "erroneous judicial interpretations" (Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 821 at 107). In enacting CPLR 205-a, the

legislature sought to, inter alia, bring greater clarity in mortgage foreclosure actions concerning what constitutes a neglect to prosecute and thereby promote "the objectives of 'finality, certainty and predictability,' to the benefit of both plaintiffs and defendants" (Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 821 at 108). We thus conclude that the legislature intended for CPLR 205-a, like the rest of FAPA, to apply retroactively (see *Deutsche Bank Natl. Trust Co.*, 239 AD3d at 833; *Bank of N.Y. Mellon*, 233 AD3d at 1251-1252; see also *Collins v Bank of N.Y. Mellon*, 227 AD3d 948, 951 [2d Dept 2024]).

We further conclude that CPLR 205-a does not extend the statute of limitations in this action and that the court therefore properly searched the record and granted defendant summary judgment dismissing the complaint (see CPLR 3212 [b]). Indeed, MCLP does not dispute on appeal that, if FAPA applies retroactively, MCLP is not entitled to the extension of time provided for by CPLR 205-a. Specifically, CPLR 205-a (a) (1) provides that the extension is not available to "a successor in interest or an assignee of the original plaintiff . . . unless [the successor in interest or assignee] plead[s] and prov[es] that such assignee is acting on behalf of the original plaintiff," and it is undisputed here that neither MTGLQ nor MCLP pleaded or proved that, in commencing this action, it was acting on behalf of the plaintiff that commenced the 2012 action. Moreover, CPLR 205-a does not apply where, as here, the first action terminated by "a dismissal of the complaint for any form of neglect, including but not limited to those [grounds] specified in . . . [CPLR 3404]" (CPLR 205-a [a] [emphasis added]; see *MTGLQ Invs., LP*, 210 AD3d at 1388). We emphasize that, given the deliberate omission from CPLR 205-a of CPLR 205 (a)'s requirement that the court outline the pattern of delay that established neglect for failure to prosecute, it is of no moment that the court here did not explain its reasons for dismissing the 2012 action under CPLR 3404 (see *Deutsche Bank Natl. Trust Co.*, 239 AD3d at 833).

MCLP contends that the retroactive application of FAPA violates its right to due process. Contrary to defendant's assertion, that issue is properly before us because MCLP served the attorney general with proper notice of its constitutional challenge before this Court (see CPLR 1012 [b]; Executive Law § 71; cf. *Matter of Rochester Police Dept. v Duval*, 232 AD3d 1247, 1248 [4th Dept 2024]). Nevertheless, we reject MCLP's due process contention on the merits (see *Bank of N.Y. Mellon v Del Rio*, 233 AD3d 529, 531-532 [1st Dept 2024]; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1069 [2d Dept 2024]). "[A]cts of the [l]egislature are entitled to a strong presumption of constitutionality" that is overcome "only when it can be shown beyond reasonable doubt that [the legislation] conflicts with the fundamental law" (*Cohen v Cuomo*, 19 NY3d 196, 201-202 [2012] [internal quotation marks omitted]). Retroactive legislation will satisfy due process if the retroactive application of the legislation is justified " 'by a rational legislative purpose' " (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 158 [2017], cert denied 584 US 1013 [2018], quoting *Pension Benefit Guar. Corp. v R.A. Gray & Co.*, 467 US 717, 730 [1984]). The legislature enacted FAPA, including CPLR 205-a, to

clarify existing law, overrule erroneous judicial interpretations, and prevent abusive foreclosure practices, and we conclude that "[r]etroactive application of the subject FAPA provisions is supported by a legitimate legislative purpose that is furthered by rational means" (*FV-1, Inc.*, 234 AD3d at 823; see generally *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 375 [2020]).

Moreover, setting aside the question whether the retroactive application of FAPA violates due process generally, we reject MCLP's contention that, in this particular case, retroactive application of CPLR 205-a unconstitutionally deprived MCLP of its settled reliance interest in this Court's prior determination that this action was timely commenced through operation of the savings provision of CPLR 205 (a) (see *MTGLQ Invs., LP*, 210 AD3d at 1388). In considering whether the retroactive application of CPLR 205-a to this case is unconstitutional in light of this Court's pre-FAPA decision concluding that application of the savings provision rendered this action timely, consideration must be given to "whether [FAPA] attaches new legal consequences to events completed before its enactment" (*American Economy Ins. Co.*, 30 NY3d at 147 [internal quotation marks omitted]). We conclude that applying CPLR 205-a retroactively here does not impact MCLP's substantive due process rights with respect to this Court's prior decision inasmuch as it does not "impair rights [MCLP] possessed when [it] acted, increase [MCLP's] liability for past conduct, or impose new duties with respect to transactions already completed" (*Regina Metro. Co., LLC*, 35 NY3d at 365 [internal quotation marks omitted]; see *Landgraf v USI Film Prods.*, 511 US 244, 278-280 [1994]).

More specifically, MCLP wrongly equates this Court's decision in the prior appeal, which allowed the action to proceed through application of the CPLR 205 (a) savings provision, to the "acts," "conduct," or "transactions" that create a vested reliance interest protected by the due process clause (see *Regina Metro. Co., LLC*, 35 NY3d at 365; *American Economy Ins. Co.*, 30 NY3d at 157). However, the bottom-line holding in our prior decision is not the correct event to analyze in considering whether MCLP has a vested reliance interest protected by the due process clause. Rather, the only past "acts," "conduct," or "transactions" on which MCLP could rely to create a constitutionally-protected due process interest concern the right of MCLP's predecessor in interest to take action to avoid dismissal of the 2012 action for neglect to prosecute (see CPLR 205-a, 3404). FAPA's enactment would result in an impermissible retroactive effect only if its application would render improper conduct that was indisputably proper at the time the predecessor in interest acted—i.e., if FAPA rendered dilatory conduct that was not dilatory at the time the 2012 action was dismissed (see generally *Ruth v Elderwood at Amherst*, 209 AD3d 1281, 1284-1285 [4th Dept 2022]). Here, there is no dispute that, either before or after FAPA's enactment, the 2012 action was properly dismissed due to the predecessor in interest's dilatory conduct. FAPA's enactment concerns only the effect of that dilatory conduct and, therefore, there is no deprivation of a substantive right. FAPA's enactment did not impair a due process

right of MCLP's predecessor in interest because at all times the predecessor in interest retained the right to more diligently prosecute the 2012 action to avoid dismissal under CPLR 3404. In essence, we conclude that MCLP does not have a protected reliance interest in its predecessor's dilatory conduct—i.e., MCLP had no due process right to utilize the savings provision to subsequently resuscitate an action that its predecessor in interest neglectfully prosecuted. Thus, retroactive application of CPLR 205-a to the facts here did not "impair rights a party possessed when [the party] acted" (*Regina Metro. Co., LLC*, 35 NY3d at 365 [internal quotation marks omitted]), and MCLP has therefore not been deprived of a substantive right implicating the due process clause. MCLP's contention asserting additional grounds for its constitutional challenge is raised for the first time in its reply brief and therefore is not properly before us (see *Aubertine v Aubertine*, 240 AD3d 1360, 1362 [4th Dept 2025]; *Consumers Beverages, Inc. v Kavcon Dev. LLC*, 227 AD3d 1381, 1384 [4th Dept 2024]; *Edwards v Edwards*, 199 AD3d 1460, 1460 [4th Dept 2021]).