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COURT OF APPEALS

STATE OF NEW YORK

U.S. BANK NATIONAL ASSOCIATION,

Respondent,

-against-

NO. 7

DLJ MORTGAGE CAPITAL, INC.,

Appellant.

20 Eagle Street
Albany, New York
January 9, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
PRESIDING JUSTICE ELIZABETH A. GARRY
ASSOCIATE JUSTICE REINALDO E. RIVERA
ASSOCIATE JUSTICE JOHN W. SWEENEY, JR.

Appearances:

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Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 7, U.S. Bank
2 National Association v. DLJ Mortgage Capital.

3 Good afternoon, counsel.

4 MR. LEVIN: Good afternoon. May it please the
5 court, Barry Levin, counsel for appellant DLJ Mortgage
6 Capital. I'd like to reserve one minute for rebuttal.

7 CHIEF JUDGE DIFIORE: Yes, sir.

8 MR. LEVIN: On this appeal, as well as in the
9 next, the statute of limitations ran without the trustee
10 providing the contractually - - -

11 JUDGE J. RIVERA: Counsel, let me - - - let me
12 ask you, with respect to your argument regarding ACE, I'm a
13 little bit - - - I'm - - - I'm having difficulty, really,
14 appreciating the persuasiveness or the attempt to persuade
15 on that.

16 Didn't we say, in ACE specifically, that we were
17 leaving open the question that's presented here about this
18 condition precedent and what effect it might have as to
19 whether or not a plaintiff could rely on CPLR 205(a)?

20 MR. LEVIN: So if you - - - the decision says
21 that at the end. You're reserving - - - you're not
22 addressing standing and 205(a). But if you look - - -
23 there were two issues. Just like today, there's two
24 appeals, there were two issues before the court there. One
25 was the statute of limitations issue - - -



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JUDGE J. RIVERA: Um-hum.

MR. LEVIN: - - - and one was the wrong party issue, which you're going to hear from my colleague on. And if you look in the transcript at page 34 on to the end of the transcript, there was a discussion about 205(a) in the context of the standing issue.

But the court never addressed the statute of limitations issue in the context of 205(a). And if you read the decision, it plainly says that the court found that the trust simply failed to pursue its contractual remedy within six years of the alleged breach. It plainly affirmed the decision of the First Department, which in the first line, held that the action is barred by the six-year statute of limitations - - - right in the first line of the First Department's decision.

There's no suggestion in the opinion that it was affirming on any ground other than the statute of limitations. We submit that ACE clearly did hold that and that that was the right decision, that what you have here is the same sole remedy provision this court has seen now, on numerous occasions. It's the only remedy available to the trustee. It's a mandatory alternative protocol. It requires notice and a ninety-day cure period. It wasn't provided.

As a matter of policy, parties should be



1 incentivized to make use of such mandatory remedies. It
2 would deprive the parties of the benefit of that remedial
3 provision to allow the trustee to file a lawsuit on the
4 last day of the statute of limitations, essentially as a
5 placeholder to try to toll the statute of limitations and
6 only then provide the required notice.

7 It would read the notice provision out of the
8 contract, and we submit that the court should not permit
9 that. And we don't think 205(a) - - -

10 JUDGE J. RIVERA: Well, what are the elements of
11 the cause of action?

12 MR. LEVIN: The elements of the cause of action
13 are, in this case, notice to Ameriquest, which was the
14 originator; allow that ninety-day cure and repurchase
15 period to run; and then it must demonstrate that, in fact,
16 there was a breach of a representation or warranty - - -

17 JUDGE J. RIVERA: I thought - - - I thought the
18 cause of action was that last one, that - - - that you
19 breached the representations that accrue at the time that
20 the agreement becomes effective - - -

21 MR. LEVIN: Exactly.

22 JUDGE J. RIVERA: - - - that contains those
23 representations. It has nothing to do with the notice and
24 the cure/repurchase provisions.

25 MR. LEVIN: So if you go back to ACE, that



1 plainly was the first holding in ACE, that the - - - the
2 claim accrues at the closing of the transaction, because if
3 there's a breach it - - - it occurred at that moment when
4 the transaction closed. That's the same here. The
5 provision here, the 2.03 section of - - -

6 JUDGE J. RIVERA: Well, that's - - - and then
7 that's - - - that's the alleged breach, right?

8 MR. LEVIN: Yes.

9 JUDGE J. RIVERA: That's the six years.

10 MR. LEVIN: Well - - -

11 JUDGE J. RIVERA: It's nothing to do with the
12 other provisions.

13 MR. LEVIN: It's all in the same provision, Your
14 Honor. There's only one provision at issue here. It's
15 2.03. And that provision, number one, says it's the sole
16 remedy for a breach; number two, makes clear the breach is
17 the breach of the representation and warranty; number
18 three, says that notice must be provided. There must be a
19 ninety-day cure period. That's designed as an alternative
20 remedy to avoid litigation. They simply didn't do it here.

21 It's all part of the same provision. And what
22 this court held in ACE - - -

23 JUDGE STEIN: So - - - so - - - so they - - - so
24 you moved to dismiss on the basis that there's a fatal
25 defect in the complaint, they haven't alleged notice,



1 right? That's - - - that's what happened. And - - - and
2 the court says yes, you're right, they haven't, so we're
3 going to dismiss without prejudice for them to make that
4 allegation.

5 MR. LEVIN: So this court has only addressed this
6 type of issue in *Yonkers v. Port Authority*, which we
7 submit, is a case just like this one. In *Yonkers*, there
8 was an alternative remedy.

9 The plaintiff did not pursue it. And in that
10 case, the first suit which was actually filed timely was
11 dismissed on the merits. And when the plaintiff then
12 attempted to comply with the remedial protocol and then
13 rely on 205(a), this court prohibited them from doing that.

14 And the only cases where this court has - - -

15 JUDGE STEIN: In *Yonkers*, the court held that it
16 was a substantive condition precedent, not a procedural
17 condition precedent.

18 MR. LEVIN: But not in the sense that it delayed
19 the accrual of a statute of limitations. To that extent,
20 it's just like this case. There was no dispute that the
21 statute accrued on day one, and you had one year from that
22 point to file a lawsuit. That's exactly what's going on
23 here. They had six years to file a lawsuit, but they had
24 to give the timely notice within that six-year period.

25 JUDGE J. RIVERA: Yeah, but the - - - the whole



1 claim turns on whether or not you complied - - - they claim
2 there's not compliance with - - - with those original
3 promises, the warranties and the - - - and the
4 representations. And they would have had to present
5 evidence on that.

6 MR. LEVIN: Well, they also have to demonstrate -
7 - -

8 JUDGE J. RIVERA: If they gave notice or not
9 wouldn't matter with respect to whether or not there was
10 compliance with that promise.

11 MR. LEVIN: Well, that - - -

12 JUDGE J. RIVERA: That's why I'm having
13 difficulty with the argument, because - - -

14 MR. LEVIN: With - - - with - - -

15 JUDGE J. RIVERA: - - - I do see this condition
16 precedent as - - - as - - -

17 MR. LEVIN: - - - with respect, if they haven't
18 complied with the condition precedent, then they've simply
19 not met the contract requirement that they agreed to - - -
20 that the trustee agreed to, as the sole remedy for breach.

21 If I can come back for one - - -

22 JUDGE FAHEY: Could I ask this? For us, is the
23 question for us if we get to the - - - to the procedural
24 condition precedent - - - is whether or not it's a final
25 judgment on the merits? Or are - - - are you saying that



1 all condition precedents, whether substantive or
2 procedural, a decision on them constitutes a final judgment
3 on the merits?

4 MR. LEVIN: We're not saying the latter, Your
5 Honor. All conditions precedent are not created equal.

6 JUDGE FAHEY: Um-hum.

7 MR. LEVIN: If you look at the cases that have
8 been decided by this court and are cited in their papers -
9 - -

10 JUDGE FAHEY: Well, I'm thinking - - -

11 MR. LEVIN: Morris Investors - - -

12 JUDGE FAHEY: - - - the language I drew from was
13 Carrick. But - - -

14 MR. LEVIN: Carrick - - -

15 JUDGE FAHEY: - - - fine.

16 MR. LEVIN: - - - so Carrick, there was no
17 dispute that the suit was timely filed.

18 JUDGE FAHEY: Um-hum.

19 MR. LEVIN: They had the wrong party. They
20 didn't have the administrator appointed, and the court
21 carved out a narrow exception for that one thing. In
22 Morris In - - -

23 JUDGE FAHEY: So - - - I don't mean to interrupt
24 you, but you've only got five minutes. Do you - - - do you
25 think that the - - - the test for us to apply is whether or



1 not a final judgment on the merits has been made?

2 MR. LEVIN: I would say it slightly differently.

3 JUDGE FAHEY: Okay.

4 MR. LEVIN: I would say the test to be applied is
5 whether the plaintiff filed this lawsuit timely. And to
6 file the lawsuit timely, under the sole remedy provision
7 that the trustee agreed to, they had to first provide
8 notice and a ninety-day cure period, because that was
9 designed to be an alternative remedy to avoid litigation.

10 And of course in ACE, notice was provide - - -
11 provided before the statute ran, but the full ninety-day
12 cure period was not allowed to run.

13 JUDGE FAHEY: So we'd be - - - we'd still be in
14 the same position on - - - on the question of finality of
15 the judgment?

16 MR. LEVIN: Yes, because if it's - - - if it's
17 untimely, then it's on the merits.

18 And the other cases where this court has ruled on
19 conditions precedent like the Morris case, the Allouette
20 case, the Fleming case, those are cases where the condition
21 precedent was imposed by statute, not by contract.

22 JUDGE STEIN: What's the basis for why should we
23 distinguish between those?

24 MR. LEVIN: Because where you've got a condition
25 precedent imposed by statute, you're balancing one



1 statutory provision - - - imposing some requirement, for
2 example, the deposit taxes - - - against another statutory
3 provision, which is 205(a).

4 But here, the parties made a decision by contract
5 to say that if you want a remedy under this contract, under
6 all of these contracts, you first must provide the notice
7 and allow the ninety-day cure period to run. If you allow
8 them to avoid that provision, you've essentially read that
9 provision out of the contract.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 Counsel?

12 MR. SELENDY: May it please the court, Philippe
13 Selendy, for U.S. Bank.

14 This case presents a classic application for a
15 Rule 205(a) refiling. The ABSHE trustee did, in fact,
16 timely file the action under Rule 213(2), and it properly
17 served a summons with notice under Rule 304, which as this
18 court held in Fleming, governs when the timing occurs, upon
19 commencement.

20 The case was dismissed without prejudice for a
21 technical defect - - -

22 JUDGE J. RIVERA: Why isn't the notice - - -
23 respond to his argument that the notice and cure/repurchase
24 provision is part and parcel of this cause of action?

25 MR. SELENDY: It - - - it cannot be. This court



1 held already that the repurchase protocol is a procedural
2 issue. It doesn't - - - and not only is it not a
3 substantive condition precedent, but it cannot, therefore,
4 be a substantive condition precedent that sets a time limit
5 as an ingredient of the cause of action, which is what this
6 court held is required in the Yonkers case, in order to
7 make 205(a) inapplicable.

8 JUDGE J. RIVERA: Where did we say it's not a
9 substantive - - -

10 MR. SELENDY: What's - - - what's - - - in saying
11 that the cause of action - - - the repurchase protocol is
12 solely procedural, you exclude the possibility of it being
13 an element of a cause of action.

14 JUDGE J. RIVERA: I'm saying but where did we say
15 that? You said we've already said that.

16 MR. SELENDY: In - - - in - - - in - - - well, in
17 the ACE case itself. And you reaffirmed that in the
18 Deutsche case, by indicating that the cause will not accrue
19 depending upon whether the repurchase protocol has been
20 satisfied or not. It's irrelevant to accrual. That's
21 because it's procedural.

22 What that means - - - and I think this is
23 conceded by DLJ - - - is that the only relevant time period
24 here is the statute of limitations in 213 itself. That is
25 on the opposite side of the fault line - - - the chasm that



1 this court created in Yonkers saying if it's a statute of
2 limitations, then 205(a) can apply. By contrast, if it's
3 something more than that, a requirement as in Yonkers,
4 where the waiver of sovereign immunity was conditioned upon
5 satisfaction of a time element, if it's something more or
6 in addition to the statute of limitations, then 205(a)
7 doesn't apply.

8 JUDGE J. RIVERA: If - - - if we agree with you,
9 do we have to reach the question whether or not that notice
10 and cure/repurchase provision requirement has to be
11 satisfied within the six-month savings clause period? Do
12 we need to get to that question?

13 MR. SELENDY: I would say, Your Honor, that in
14 this case, it was, in fact, satisfied within the six-month
15 savings clause, so the court need not reach that. But I
16 will point out that the core argument made by the
17 appellants here is that because this is a condition
18 precedent, it must be satisfied before the expiree of the
19 statute of limitations.

20 This court has repeatedly rejected that exact
21 argument, in Fleming, in Carrick, in Morris Investors.
22 Again and again, the court said that the condition
23 precedent could be satisfied after the expiration of the
24 statute of limitations, and the procedural defect could
25 then be cured under the 205(a) refiling.



1 There's just no precedent for the suggestion that
2 instead the condition has to be satisfied before. And
3 indeed, that would make a mockery not only of those prior
4 Court of Appeals decisions, but a long line of cases from
5 the First Department and the other departments, which we've
6 cited in our response to the SIFMA amicus brief, which I
7 commend you to.

8 And indeed, this rule - - - the whole purpose of
9 this rule, it's a broad and remedial rule as Judge Cardozo
10 said in the Gaines case. It has antecedents for hundreds
11 of years. It was first adopted in 1788 in New York. It's
12 been repeatedly reaffirmed. The only significant change is
13 that in 1962, the one-year grace period was narrowed to six
14 months.

15 But time and again, the legislature has said that
16 if the action is timely commenced in accordance with 304
17 and within the statute of limitations period, then the
18 plaintiff has the ability to refile for a procedural
19 defect, i.e., a defect that does not go to the merits,
20 provided - - - provided there has not been any failure to
21 prosecute. And no such failure has been - - -

22 JUDGE R. RIVERA: Counsel - - -

23 MR. SELENDY: - - - alleged here.

24 JUDGE R. RIVERA: Sorry. I'm sorry. Counsel,
25 are you circumscribing your presentation and your argument



1 only to the procedural posture of this appeal, or are you
2 also implying, if you succeed, that in going back to nisi
3 prius, you are going to prevail on the merits? Are you
4 weaving that in and out of the argument?

5 MR. SELENDY: No. No, Your Honor. The issue of
6 the merits are really not even addressed. It was not hit.
7 That turns on the extent of the rampant breaches - - - the
8 alleged rampant breaches by DLJ of the reps and warranties
9 concerning the loans.

10 That question never arose. That's why under this
11 court's ruling in Carrick, the dismissal for failure to
12 satisfy the repurchase protocol cannot be a judgment on the
13 merits. There's been no adjudication of any kind relating
14 to the merits of the case.

15 JUDGE R. RIVERA: Is it then safe to say that
16 both ACE and Deutsche Bank/Flagstar are solidly the corner
17 supporting your argument?

18 MR. SELENDY: ACE and Deutsche Bank are solidly
19 supporting us as does Yonkers itself, because all of these
20 cases are drawing the distinction between, on the one hand,
21 a procedural condition precedent and on the other, a
22 substantive one that incorporates a time limit as an
23 ingredient of the cause of action, which obviously we do
24 not have here.

25 And I'll point out, DLJ, had they wanted that,



1 could have written it into the contract. Rule 205(a) is
2 just as much a part of the CPLR as is Rule 213. Every
3 contract for literally hundreds of years in New York, has
4 been written against the backdrop of those two rules
5 working together.

6 JUDGE J. RIVERA: So what are you saying they - -
7 - that could have been negotiated?

8 MR. SELENDY: They - - - that - - -

9 JUDGE J. RIVERA: What could have been this
10 language?

11 MR. SELENDY: - - - DLJ could have said - - -
12 they could have said, look, if you wish to exercise this
13 sole remedy, you have to exercise it within a certain
14 number of years. And they could have tried to define a
15 time limit rather than defaulting to CPLR itself, which
16 under Rule 213 gives six years, as modified, where
17 applicable, by Rule 205(a).

18 Having failed to do that, they should live by the
19 benefit of the bargain, and that means that in this case,
20 as is true in 205(a) cases generally, and indeed, not just
21 in this state, but across the country, where forty-two
22 other states have similar rules - - - twenty-nine of which
23 followed Judge Cardozo - - -

24 JUDGE J. RIVERA: And just to be clear, your
25 position is not that at some point - - - at some point the



1 trustee has got to satisfy the - - - the notice requirement
2 - - -

3 MR. SELENDY: Absolutely.

4 JUDGE J. RIVERA: - - - and give that
5 opportunity.

6 MR. SELENDY: Absolutely. And the trustee did in
7 fact - - -

8 JUDGE J. RIVERA: Your point is, it just doesn't
9 have to be in the six years - - -

10 MR. SELENDY: Correct.

11 JUDGE J. RIVERA: - - - the original six years?

12 MR. SELENDY: Correct. That's exactly the
13 purpose of the savings provision, to try and correct that
14 technical defect.

15 The trustee did, in fact, completely abide by the
16 repurchase protocol. I'll note that in this case they did
17 give notice to DLJ five years and four months from the
18 closing of the trust.

19 The only reason why a second repurchase demand
20 was required is that it's a guaranty obligation, and so
21 they were held to be responsible for the formal notice to
22 the defunct originator in order to then pursue the guaranty
23 - - -

24 JUDGE J. RIVERA: And if they - - -

25 MR. SELENDY: - - - against DLJ.



1 JUDGE J. RIVERA: - - - at that point complied,
2 then perhaps that takes care of the litigation. And if
3 not, you move forward on the merits about the breach of the
4 warranties.

5 MR. SELENDY: Correct. And - - - and I'll just
6 flag for the court, we do have an independent basis to go
7 forward on the guaranty claim alone, but we submit that the
8 205(a) application is about as simple and clear as it could
9 be. The rule is straightforward. This court declined in
10 George to adopt any of the new exceptions that plaintiff
11 and - - - sorry, that DLJ and SIFMA have - - - has
12 proposed. And the rule should be applied here and the
13 First Department affirmed.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MR. SELENDY: Thank you.

16 CHIEF JUDGE DIFIORE: Mr. Levin?

17 MR. LEVIN: We do not concede that the case was
18 timely filed. Counsel stated that if we had just
19 negotiated the right contract; but what the court told us,
20 what the Supreme Court decision told us, which is not
21 challenged on appeal here, is that in order to effect the
22 sole remedy provision here, the trustee must first give
23 notice to Amerquest, which is the originator of the loans,
24 and allow Amerquest a ninety-day period to cure and
25 repurchase. That didn't happen within the statute of



1 limitations.

2 They simply didn't do anything at all. He's
3 right, they gave notice to DLJ. But we negotiated a
4 contract that required notice to this other party, and that
5 notice wasn't provided.

6 We think this is directly like the decision in
7 Yonkers - - -

8 JUDGE J. RIVERA: Can - - - can you address his
9 point about the remedial nature of the statute and that
10 it's supposed to be given liberal - - - a liberal
11 interpretation and not to be treated frivolously - - - if
12 you remember some of that language from the cases?

13 MR. LEVIN: So the cases talk about protecting
14 the diligent suitor. And this was not a diligent suitor.
15 The contract is - - - is clear. The requirement is clear.
16 The - - - they knew how to give notice. U.S. Bank is
17 before this court and other courts in the state on many of
18 these. They simply didn't comply with the provision here.

19 There's no reason - - - if we're seeking
20 certainty and finality, which is what you seek from the
21 statute of limitations - - - there's no reason here to
22 provide any relief under 205(a), because the parties did
23 exactly what counsel suggested we should do. We negotiated
24 a specific provision requiring notice as an alternative to
25 litigation. They didn't honor that provision.



1 It's not that they could do it - - - well, Your
2 Honor asked could they do it after the six-year period?
3 The problem with that is that what the Deutsche Bank tells
4 us, is that even if the parties tried to negotiate for
5 something that extended the statute of limitations beyond
6 six years, you can't do that, because at the time of
7 contracting, you can't have a contract that extends the
8 statute of limitations beyond the six years.

9 JUDGE STEIN: Well, you wouldn't - - - you
10 wouldn't be doing that, would you? Because the - - - they
11 - - - they filed - - - they filed an action.

12 MR. LEVIN: So I'm - - - I'm respond - - - they
13 did file the action. But we submit the action is not
14 timely filed. Because if you allow them to proceed without
15 having allowed the cure period to run, then they've
16 effectively taken away the very thing they said we were
17 supposed to do: negotiate that protection. We negotiated
18 that protection.

19 JUDGE J. RIVERA: Yeah, but I think the point is,
20 the second argument you're making rises and falls with the
21 first. So if we disagree with you on the first, this one
22 also fails. I - - - I - - -

23 MR. LEVIN: Yes.

24 JUDGE J. RIVERA: - - - not speaking for Judge
25 Stein. But I think that's - - -



1 MR. LEVIN: - - - I under - - -

2 JUDGE J. RIVERA: - - - where she was going with
3 that question.

4 MR. LEVIN: - - - I understand that. But - - -
5 but we submit there's no question here that the statute
6 accrued on the date of the breach, which is the date of the
7 contract. And - - - and as a small aside, we submit that,
8 in fact, they're suing on two contracts. The other one is
9 the mortgage loan purchase agreement dated October 23,
10 2006, which is more than six years before. That's
11 addressed in our briefs.

12 But even if you assume it's November 30, when
13 that statute of limitations ran, they had not provided the
14 notice that we bargained for or allowed the cure period
15 that we bargained for. And this makes this case like
16 Yonkers and unlike Carrick or Fleming or the other cases
17 this court has decided.

18 And where the parties have specifically
19 negotiated for that relief, there's nothing in 205(a) that
20 would let them get - - -

21 JUDGE J. RIVERA: But when you negotiated - - -

22 MR. LEVIN: - - - around it.

23 JUDGE J. RIVERA: - - - when you negotiated this
24 term, there wasn't clear law saying the notice and
25 cure/repurchase obligations had to be met within the six-



1 year statute of limitations, right? There wasn't - - -
2 there wasn't - - -

3 MR. LEVIN: So - - -

4 JUDGE J. RIVERA: - - - clarity at that point in
5 your position.

6 MR. LEVIN: I would - - - I would concede that
7 there was not clarity. But the contract is clear that they
8 have to provide that notice. There's no appeal here that
9 the contract doesn't say what it says, which is you must
10 provide notice - - -

11 JUDGE J. RIVERA: Yes, well, the question is - -
12 -

13 MR. LEVIN: - - - and a cure period.

14 JUDGE J. RIVERA: - - - whether or not they had
15 to do that within the six years? So of course, there's
16 clarity that that is what they negotiated - - -

17 MR. LEVIN: So - - - so we would say the relevant
18 law was Yonkers, which was 1999, which was actually the
19 most recent time that this court has addressed 205(a). And
20 in Yonkers, addressing a - - - a similar remedial provision
21 there requiring that a matter be submitted for resolution
22 before the Chief Engineer of the City, the court said you
23 failed to honor that; you can't rely on 205(a). And we
24 submit that's exactly the issue before the court here.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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MR. LEVIN: Thank you.

(Court is adjourned)



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of U.S. Bank National Association v. DLJ Mortgage Capital, Inc., No. 7 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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