



NM Court of Appeal Rules on Statutes of Limitation for Notes and Mortgages

BY JASON C. BOUSLIMAN, ESQ.

MANAGING ATTORNEY-NEW MEXICO, MCCARTHY HOLTHUS, LLP | JBOUSLIMAN@MCCARTHYHOLTHUS.COM

TWO RECENT NEW MEXICO Court of Appeals cases are set to change the landscape for filing foreclosure actions, specifically where the initial default on the note occurred outside the statute of limitation. Both cases hold that a note and mortgage constitute an installment contract, and consequently the statute of limitation runs from the date of each individual missed payment. *LSF9 Master Participation Trust v. Moreno*, No. A-1-CA-36879 (Ct. App. December 18, 2019) citing *LSF9 Master Participation Trust v. Sanchez*, 2019-NMCA-055, 450 P.2d 413. The effect of these decisions is to potentially allow lenders to foreclose a debt even where the initial default falls beyond six years from the date the complaint is filed.

In *Moreno*, the initial payment default occurred on November 1, 2009, and the complaint for foreclosure was filed on December 11, 2015. The District Court ruled that the six-year statute of limitation began to run on November 1, 2009, and expired on November 1, 2015. The District Court's position was that the complaint was filed one month and eleven days too late, and was therefore dismissed. The Court of Appeals disagreed, finding that the statute of limitation runs from the date of each individual missed payment. Therefore, although the bank was not allowed to recover payments due more than six years from the filing date, the bank was entitled to recover payments due within the six-year window. Similarly, in *Sanchez*, the Court concluded that the statute of limitation began to run with respect to each installment when due.

In *Moreno*, the Court of Appeals rejected the bank's argument that the District Court abused its discretion by allowing the homeowner to amend his answer to assert the statute of limitation as a defense. However, the Court of Appeals adopted the argument that the lender was entitled to thirty days of tolling given the mandatory demand letter peri-

od. In New Mexico, the demand letter is a requirement not only under the security instrument, but also under the New Mexico Home Loan Protection Act (HLP NMSA 1978 Section 58-21A-6(A)). The notice of default in this case was sent on April 29, 2010, and provided an additional thirty day tolling period during which no action could be filed.

Some questions remain as to the application of *Sanchez* and *Moreno* when applied to defaults that occur beyond the statute of limitation. Mortgage lending institutions should be aware of prior fore-

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closure cases that resulted in dismissals with prejudice, or that were based on lack of prosecution. The industry should also ensure that when rolling a due date forward to comply with the six-year timeframe, that they are reviewing and taking necessary action with respect to any uncollectible amounts due, including: attorney fees, late fees,

These favorable rulings should be beneficial by further clarifying industry practices and policies in an increasingly complex judicial foreclosure state. They will protect lenders during the thirty-day default notice period, and in cases that are filed close to the expiration of the statute of limitation. The judicial recognition of the installment contract theory is a boon



and even taxes and escrow. All cases should be individually reviewed for prior accelerations and if needed a deceleration analysis should be completed prior to filing the complaint.

for the mortgage lending industry in New Mexico, by limiting the loss exposure to debts outside of the six-year limitation period, rather than the entire balance in similar circumstances. **a**