DE FRANCESCA LAW

REAL ESTATE AND MORTGAGE REPORT

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When It is Too Late to Enforce a Mortgage Payment

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Abstract

Lenders must be aware that the Real Property Limitations Act states a mortgage action must be commenced within ten years next after a right to receive payment accrues to the lender unless in the meantime the borrower pays part of the principal or interest, or acknowledges in writing the lender's continued entitlement to payment. It follows that the limitations period commences as soon as a payment under a mortgage is not paid on the due date, as this is the time that the right to payment accrues. After the limitation period expires, a lender is barred from commencing an action to enforce payment of a mortgage.

Full Article

The case of *Bonner v. Bonner*, concerns an action by the Plaintiff for foreclosure order on a mortgage. The Plaintiff was married to a professional gambler. Over the course of her relationship with her husband, the Plaintiff made numerous loans to him totaling $100,000. Fearing her husband would gamble away all their possessions, the wife convinced her husband to provide her with a first mortgage on one of his properties as both security for repayment of her loans to her husband and as protection for the Plaintiff's financial well-being in the event the husband irresponsibly gambled away all of the couple's marital possessions. The property in question also happened to be jointly owned by the Plaintiff's husband's son.

The Defendants were the Plaintiff's husband and her husband's son. The husband chose not to defend the action, but his son wished to prevent the foreclosure on the property in which the son had a joint interest. The son denied signing a mortgage on the property, but stated that even if he did sign the mortgage, the Plaintiff was barred from enforcing the mortgage due to the *Real Property Limitations Act* which states that a mortgage action must be commenced within ten years after the right to receive payment has accrued. The Defendant argued that since the plaintiff had a demand mortgage in which payment could be demanded at any time, the Plaintiff's right to receive payment accrued in 1994 as soon as the mortgage was executed. Since the action was not commenced until thirteen years later in 2008, the Defendant believed the Plaintiff's ability to enforce the mortgage was barred by the limitation period.

TIME LIMITS ON MORTGAGE ENFORCEMENT:

When is it too late to enforce a mortgage?

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The mortgage on the property provided for an annual fixed rate of interest of ten per cent over a term of fifteen years with no payment due until the mortgage had matured. The Court said that since no payment under the mortgage was due until the due date, the demand element of the mortgage was only active at the expiry of the due date. In other words, the right to receive payment under the mortgage did not accrue until after both the mortgage due date had expired and a demand for payment had been made. It follows that since demand for the mortgage was not made until 2008, and the mortgage due date was not until 2009 (15 years after the mortgage was executed in 2004), the right to payment did accrue until 2009 and thus the limitation period did not begin running until this time and consequently did not expire.

Finally, using a hand writing analysis expert the Court determined that the mortgage was, in fact, signed by the son and therefore was a valid mortgage.

The Court allowed the plaintiff to foreclose on the property.

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