IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN RE: THE ESTATE OF NORAIR AVAKIAN, DECEASED, BURNETTE AVAKIAN, EXECUTRIX

NO. 2015-CA-01520

APPEAL FROM THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

BRIEF OF APPELLANT BURNETTE AVAKIAN, EXECUTRIX OF THE ESTATE OF NORAIR AVAKIAN, DECEASED

******Oral Argument Requested******

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. S. Craig Panter, attorney for Appellant.
2. David L. Sanders, attorney for Appellant.
3. William Jacob Long, IV, attorney for Appellee.
4. Christopher Myers, attorney for Appellee.
5. Fidelity Title Insurance Company
6. The parties.

/s/ S. Craig Panter
S. Craig Panter, attorney for Burnette Avakian

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

Issue One: **T**he lower court held that a court order that prohibited a lender from foreclosing on property owned solely by a wife had the effect of tolling the running of the statute of limitation on the lender's separate claim against the husband on his promissory note. Was this error?

Issue Two: The lower court ruled that Mrs. Avakian could not rely upon the statute of limitation because she, as executrix, did not mail written notice to the lender of the opening of the estate and the need to file a claim. Was this error?

STATEMENT OF THE CASE

A. *Nature of the Case*

This a dispute as to whether a lender's claim filed in an estate proceeding was barred by the statute of limitation.

B. *Course of Proceedings*

On July 19, 2010, Norair Avakian passed away. On July 28, 2010, his wife, Burnette Avakian, was issued letters testamentary by the Chancery Court of Lowndes County, Mississippi.[1]

On October 15, 2014, a Statement of Claim was filed in the estate proceeding by J.P. Morgan Chase Bank, N.A., on behalf of a lender. Although the lender was not identified, it was clear that the claim was based upon a promissory note signed only by Mr. Avakian, being the same note that Appellee Wilmington Trust now claims to hold.[2]

On January 30, 2015, Mrs. Avakian filed her Executrix's Contest of the Statement of Claim, asserting that any claim on the promissory note was time barred by Miss. Code Ann. § 15-1-25, and that pursuant to Miss. Code Ann. § 15-1-3, the claim was extinguished.[3]

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[1] R.24; R.Ex.004.

[2] R.40. As discussed below, the mere filing of a Statement of Claim in an estate proceeding does not toll the running of the statute of limitation. The creditor must file a timely lawsuit to enforce that claim.

[3] R.46.

C. *Disposition in the Lower Court*

The chancery court heard oral argument and considered the submissions of the parties. Having done so, the court issued its Opinion and Judgment on September 8, 2015.[4]

The chancery court held that a federal court order that prohibited foreclosure on the home owned by Mrs. Avakian alone tolled the running of the statute of limitation on Wilmington Trust's claim against Mr. Avakian on his promissory note.[5]

The lower court also held that the statute of limitation did not run because Mrs. Avakian, as executrix, did not mail written notice to the lender explaining that the estate had been opened and that a claim should be filed.[6]

D. *Statement of the Facts*

As the chancellor noted in his Opinion and Judgment, "[i]n their filings with the Court, each party submitted certain documents as exhibits. Neither party has disputed the authenticity of those documents, nor does the Court. In addition, neither party has taken the position that any of the material facts are in dispute."[7]

As a result, the following recitation of facts is drawn primarily (and often verbatim) from the chancery court's Opinion and Judgment.

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[4] R.163; R.Ex.007.

[5] R.172-174; R.Ex.016-018.

[6] R.175-176; R.Ex.019-020.

[7] R.163; R.Ex.007.

Mr. and Mrs. Avakian purchased a house located at 1024 College Street, Columbus, Mississippi, on September 18, 2002. They executed a deed of trust to secure a loan for the purchase from Southstar Financing, LLC. Title to the property was vested in both their names as joint tenants.[8]

On November 2, 2004, Mr. Avakian executed a deed that conveyed title to the property to Mrs. Avakian alone.[9]

In March of 2006, Mr. Avakian refinanced the mortgage with EquiFirst Corporation ("EquiFirst") and took out the new loan in his name only. Mr. Avakian alone executed a promissory note in favor of EquiFirst.[10]

Because the house was homestead property pursuant to Miss. Code Ann. § 89-1-29, EquiFirst required both Mrs. Avakian and Mr. Avakian to execute a deed of trust.[11]

Mr. Avakian was out of state at the time of closing. As a result, the lender forwarded one set of loan documents to Mr. Avakian for him to execute and return and had Mrs. Avakian execute a second set the following day.[12]

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[8] R.164; R.Ex.008.

[9] R.164; R.Ex.008.

[10] R.164; R.Ex.008.

[11] R.164; R.Ex.008. Mr. Avakian's rights under the homestead law did not give him property rights in the house but simply a veto power over it being pledged or sold. *Ward v. Ward*, 517 So. 2d 571, 572 (Miss. 1987).

[12] R.164; R.Ex.008.

This resulted in two deeds of trust on the property – one executed by Mr. Avakian on March 7, 2006, and one executed by Mrs. Avakian on March 8, 2006. Each deed of trust was recorded as a separate instrument with Lowndes County Chancery Clerk.[13]

Thereafter, Mr. Avakian's promissory note to EquiFirst was sold to Citibank, N.A. ("Citibank") in its capacity as trustee of the Bear Sterns Asset Backed Securities Trust 2007-2, Asset-Backed Certificates, Series 2007-2 ("Bear Sterns"). J. P. Morgan Chase Bank, N.A. ("J. P. Morgan") became the servicing agent for Citibank.[14]

Mr. Avakian fell in default on the loan, and shortly thereafter, on July 19, 2010, he died. On July 28, 2010, Mrs. Avakian was issued letters testamentary in this case.[15]

The chancery court found it significant that Mrs. Avakian, as Executrix, did not identify EquiFirst or Citibank as a known creditor of the Estate with respect to Mr.

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[13] R.164; R.Ex.008.

[14] R.164; R.Ex.008. Mrs. Avakian pauses here to note that subsequent to the lower court's ruling, it came to her attention that there was a problem with the assignments of the promissory note and deeds of trust that might very well mean Wilmington Trust does not have good title.

That issue was presented in a separate suit filed by Wilmington Trust against Mrs. Avakian and the estate on February 23, 2015, and it is not an issue presented by this appeal. Mrs. Avakian only mentions this so that, in reciting the findings of the lower court in this case, she is not perceived as waiving that issue in the other case.

See also the comment of the chancellor in this present action: "[T]he sole issue before this Court is whether or not a creditor's claim as it relates to a promissory note is time barred." R.163; R.Ex.007.

[15] R.164-165; R.Ex.008-009.

Avakian's promissory note.[16] As discussed below, that does not affect the outcome of this appeal.

The first attempt at foreclosure began as early as December 2010 but it was never completed. In early 2012, Citibank again gave Mrs. Avakian notice that it intended to foreclose on the house. The sale was set for May 10, 2012.[17]

On May 9, 2012, Mrs. Avakian filed suit in the Lowndes County Chancery Court against Citibank seeking to enjoin the foreclosure by contending that the two deeds of trust on the home were both void pursuant to Miss. Code Ann. § 89-1-29 because neither contained the signatures of *both* Mrs. Avakian and Mr. Avakian.[18]

The lawsuit was removed to the United States District Court for the Northern District of Mississippi.[19]

On December 3, 2012, Wilmington Trust, National Association ("Wilmington") replaced Citibank as the Trustee for Bear Sterns. Neither Mrs. Avakian, nor the United States District Court, was informed of this fact at that time.[20]

Following a trial in February 2014, the United Stated District Court entered a Final Judgment in favor of Mrs. Avakian and held that the deeds of trust on the house

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[16] R.165; R.Ex.009.

[17] R.165; R.Ex.009.

[18] R.165; R.Ex.009.

[19] R.165; R.Ex.009.

[20] R.165; R.Ex.009.

were unenforceable. The decision was appealed by Citibank to the United States Fifth Circuit Court of Appeals. During the appeal, the Fifth Circuit issued a stay on May 12, 2014, that prohibited foreclosure on the property during the pendency of the appeal.[21]

Based on the District Court's ruling, on October 15, 2014, J. P. Morgan filed a Statement of Claim based upon Mr. Avakian's debt arising from the promissory note of $815,905.06. The statement provided that "[t]he claim was presumed secured pursuant to a mortgage loan; however, the claim has been deemed unsecured via a Judgment rendered in the matter styled, *Burnette Avakian v. Citibank, N.A.*, in the United States District Court for the Northern District of Mississippi."[22]

On October 26, 2014, the four-year statute of limitations provided by Miss. Code Ann. § 15-1-25 expired concerning claims against Mr. Avakian's estate.[23]

On December 9, 2014, the Fifth Circuit Court of Appeals reversed the United Stated District Court, making an *Erie*-guess holding that the Mississippi Supreme Court would likely construe the two deeds of trust as together creating a valid deed of trust

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[21] R.166; R.Ex.010.

[22] R.166; R.Ex.010.

[23] R.166; R.Ex.010. Although the chancellor stated at this point in his Opinion and Judgment that the statute of limitation expired, he subsequently held that the running of the statute had been tolled.

signed by both spouses (therefore, meeting the requirements of Miss. Code Ann. § 89-1-29).[24]

The Fifth Circuit remanded for further proceedings. Citibank then filed a Motion for Entry of Final Judgment in the United States District Court.[25]

On January 30, 2015, Mrs. Avakian filed her Executrix's Contest of J. P. Morgan's Statement of Claim, asserting that any claim on the promissory note was time barred by Miss. Code Ann. § 15-1-25, and that pursuant to Miss. Code Ann. § 15-1-3, the claim was extinguished.[26]

On February 23, 2015, Wilmington Trust filed suit in the Lowndes County Chancery Court against Mrs. Avakian, individually, and the Estate of Norair Avakian seeking to foreclose on the home and to recover against the Estate on the promissory note. *See* Civil Action No. 1:15-cv-00099-HJD.[27]

On May 27, 2015, Wilmington filed a response to Mrs. Avakian's contest of claim in the estate matter, and on June 12, 2015, Mrs. Avakian filed her Reply of Executrix.[28]

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[24] R.167; R.Ex.011.

[25] R.167; R.Ex.011.

[26] R.46, 167; R.Ex.011.

[27] R.167; R.Ex.011.

[28] R.61, 167; R.Ex.011.

On August 4, 2015, the United States District Court, Northern Division, entered a Final Judgment in favor of Wilmington Trust after granting Wilmington Trust's Motion to Substitute itself in place of Citibank.[29]

As noted, on September 8, 2015, the chancery court issued its Opinion and Judgment.

In doing so, the chancery court opined that "[i]t appears that having been unsuccessful in setting aside the deeds of trust in federal court, it is Mrs. Avakian's hope that by this Court barring the promissory note, the deeds of trust can be set aside here in state court. Where the debt is barred, the mortgage [deed of trust] cannot be enforced."[30]

The chancellor was correct, and Mrs. Avakian is not embarrassed to say so. She does not want to lose her home and her business (bed and breakfast) in one fell swoop.

Mrs. Avakian did not ultimately prevail in federal court on her challenge to the validity of the two deeds of trust under Mississippi's homestead laws. As the chancellor himself noted, however, after the case was tried in federal court, the statute of limitation (unless it was tolled) ran on Wilmington Trust's claim on the promissory note. As the chancellor also noted, where the debt is barred, the deed of trust cannot be enforced.

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[29] R.168; R.Ex.012.

[30] R.169; R.Ex.013 (citations omitted).

So, Mrs. Avakian has no reservation about invoking the statute of limitation in an effort to stay in her home and keep running her only source of livelihood.

SUMMARY OF THE ARGUMENT

As explained in *West Point Corp. v. New North Mississippi Federal Savings & Loan Association*, 506 So. 2d 241, 242-43 (Miss. 1986), a lender who takes a promissory note and deed of trust has several options in the event of default. The lender may:

- Sue the maker on the promissory note without resorting to foreclosure;
- Foreclose on the property without suing on the promissory note; or
- Do both.

Id.

In this case, in the event of a default by Mr. Avakian on his promissory note, the lender would have the option of:

- Suing Mr. Avakian on the promissory note;
- Foreclosing on Mrs. Avakian's home; or
- Doing both.

This clearly tells us that the lender had different remedies against different people. Mr. Avakian could be sued on the promissory note. Mrs. Avakian could be have her home foreclosed upon. The lender could do both. As discussed below, the critical difference is that once the lender's claim on the note becomes time-barred, the lien is extinguished.

If the lender had decided to sue Mr. Avakian on the note, Mrs. Avakian would

not have been a party to that action, nor would she have had legal standing to object to such. There is nothing Mrs. Avakian could have done to interfere with that suit because she was not a party to the promissory note.

This leads to the inevitable conclusion that the steps Mrs. Avakian took in federal court to protect her own property could not toll the running of the statute of limitation on the lender's *separate* claim against Mr. Avakian on his promissory note. To hold otherwise would mean a person who pledged property as security for the debt of another could unilaterally extend the statute of limitation on that other party's debt.

The fact that the federal court said (for some period of time) that the lender could not foreclose on Mrs. Avakian's house in no way prohibited the lender from pursuing its separate claim against Mr. Avakian (or, subsequently, his estate). The tolling provisions of Miss. Code Ann. § 15-1-57 do not apply here.

As a result, notwithstanding anything that happened in federal court between Mrs. Avakian and Citibank, the statute of limitation on the lender's claim against Mr. Avakian (and subsequently his estate) continued to run.

As the lower court noted, the statute expired on October 26, 2014, without the lender having ever filed suit to enforce its claim.[31]

In Mississippi, a deed of trust simply provides security for a debt, almost always in the form of a promissory note. When the claim on the promissory note becomes time-barred, not only is a remedy barred, but the claim itself is extinguished. *See* Miss Code

[31] R.170; R.Ex.014.

Ann. § 15-1-3.

When the claim on Mr. Avakian's note became extinguished, so did the claim on the deed of trust. "If no debt exists, then the lien perishes." *Frierson v. Mississippi Rd. Supply Co.*, 221 Miss. 804, 810, 75 So. 2d 70, 72 (1954); *Estate of Walters v. Freeman*, 904 So. 2d 1140, 1143 (Miss. Ct. App. 2004).

"When a note secured by mortgage becomes barred by limitation, or in any other way becomes canceled, then the mortgage securing the payment of the note is also extinguished, for the plain reason that when the debt is gone there is nothing left to secure." *Hembree v. Johnson*, 119 Miss. 204, 80 So. 554, 555 (1919).

In summary, Wilmington Trust's claim on the promissory note signed by Mr. Avakian became time-barred on October 26, 2014. At the time, the debt was extinguished, and the deeds of trust perished.

With respect to the second issue, the lower court erred in ruling that the statute of limitation did not run because Mrs. Avakian, as executrix, did not mail written notice to the lender of the need to file a claim. The case law says otherwise.

ARGUMENT

Issue One: **T**he lower court held that a court order that prohibited a lender from foreclosing on property owned solely by a wife had the effect of tolling the running of the statute of limitation on the lender's separate claim against the husband on his promissory note. Was this error?

A. *Standard of Review*

The lower court ruled, as a matter of law, that the claim of Wilmington Trust was not barred by the statute of limitation.

"The application of a statute of limitations is a question of law." *Powe v. Byrd*, 892 So. 2d 223, 227 (Miss. 2004). On appeal, he standard of review of questions of law is *de novo*. *Id.*

B. *Statutes of limitation in estate proceedings*

Pursuant to Miss. Code Ann. § 15-1-25:

> An action or scire facias may not be brought against any executor or administrator upon any judgment or other cause of action against his testator or intestate, except within four years after the qualification of such executor or administrator.

At the same time, Miss. Code Ann. § 91-7-239 states that no suit or action may be brought against an executor until 90 days after the date letters testamentary are issued.

Construing the two statutes together, the four-year statute in Section 15-1-25 begins to run at the end of the 90 day moratorium established by Section 91-7-239. *See Townsend v. Estate of Gilbert*, 616 So. 2d 333, 335-36 (Miss. 1993).

In this case, Mrs. Avakian received letters testamentary on July 28, 2010. The 90 day moratorium expired on October 26, 2010. At that point, the four-year statute of limitation established by Section 15-1-25 began to run, and it expired on October 26, 2014 (unless it was tolled).

As noted above, the lender (through J.P. Morgan Chase) filed a statement of

claim on October 15, 2014. Under well-established Mississippi law, however, the mere filing of a notice of claim does not stop the running of the four-year statute of limitation. Instead, if the creditor is not paid on that claim, the creditor must bring suit to enforce its claim before the four-year statute of limitations expires.

As the Mississippi Supreme Court held in *Rogers v. Rosenstock*, 117 Miss. 144, 77 So. 958, 959 (1918):

> [S]ection 3105 (*now 15-1-25*) is clear and unambiguous, and under the strict language of this section the owner of a probated claim must insist upon satisfaction or bring his action against the executor or administrator within four years and six months (*now 90 days*) from the date of letters testamentary or administration.

See also Townsend v. Estate of Gilbert, 616 So. 2d 333 (Miss. 1993) [Section 15–1–25 carves out a specific statute of limitations period in order to preempt the general limitations period]; *Toler v. Wells*, 158 Miss. 628, 130 So. 298, 300 (1930) [even though a creditor's claim had been probated against the estate, because no action of any nature was taken in the administration proceedings or otherwise to enforce payment of the claim, the claim was barred by the four year statute of limitation]*; Duffy v. Kilroe*, 116 Miss. 7, 76 So. 681, 682 (1917) [after a claim has been probated and registered, the only statute of limitation which thereafter runs against it is section 3105 (*now Section 15-1-25*)].

Thus, even when a creditor files a *notice* of claim, if the creditor is not paid on that claim, Section 15-1-25 requires that the creditor bring suit to enforce the claim before the four-year statute expires. As the lower court noted, that did not happen here.

C. *The question of whether the statute was tolled by events in federal court*

The lower court accepted Wilmington Trust's argument that an Order entered by the Fifth Circuit Court of Appeals tolled the running of Section 15-1-25.

At the outset, it is noteworthy that the Order in question was entered on the motion of Citibank (Wilmington Trust's predecessor). The Order recites:

> The appellant, Citibank, N.A. ("Citibank"), moves for a stay pending appeal. In the district court, the appellee, Burnette Avakian, stated that she "does not oppose the Court [*sic*] granting a stay as long as two conditions are met. First, Citibank should be required to post a sufficient bond. Second, Citibank should be expressly prohibited from trying to take advantage of the stay by attempting to foreclose upon the property during appeal."
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> * * *
>
> Citibank has made a sufficient showing to justify a stay, especially in view of the fact that the parties were agreed to that resolution subject to the two stated conditions. The motion for a stay pending appeal is GRANTED, subject to the two conditions.

In reaching his decision that this Order tolled the running of the statute of limitation on the lender's separate claim against Mr. Avakian's estate, the chancellor relied upon Miss. Code Ann. § 15-1-57, which provides:

> When any person shall be prohibited by law, or restrained or enjoined by the order, decree, or process of any court in this state from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined or restrained, shall not be computed as any part of the period of time limited by this chapter for the commencement of such action.

In briefing in the lower court, Mrs. Avakian pointed out that the federal court stay only prohibited foreclosure on her house. It did not prohibit Citibank,

Wilmington, or any other party from filing suit against the Estate to enforce the promissory note.[32]

In rejecting Mrs. Avakian's contention, the lower court relied upon *Temples v. First National Bank of Laurel*, 239 Miss. 446, 123 So.2d 852 (1960). A somewhat lengthy quote from the chancellor's Opinion and Judgment is helpful here:

> [T]his Court's reasoning is more in line with *Temples v. First Nat'l Bank of Laurel*, 123 So.2d 852, 855-56 (1960) and quoting 41 *A.L.R.* 822, which states that "[i]t appears to be generally held that a mortgage or deed of trust securing a bond or note is a mere incident thereof…," a deed of trust is a deed which conveys title to real property to a trustee as security for the repayment of a loan by grantor. *Black's Law Dictionary* 423 (7th ed. 1999).
>
> Upon default of the loan (non-payment of periodic installments), the trustee may accelerate the debt and proceed with foreclosure. Thus, any tolling of a right or remedy as to the deed of trust, similarly tolls the right or remedy as to the promissory note.[33]

Mrs. Avakian acknowledges that, in *Temples*, the Mississippi Supreme Court did describe a deed of trust as a mere incident to the bond or note it secures. The Supreme Court did not, however, state that any tolling of a right or remedy as to a deed of trust would toll the right or remedy as to the promissory note.

To the contrary, the Supreme Court held that an act that tolled the running of the statute of limitations *on the note* would also toll the statute of limitations as to the deed

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[32] R.173; R.Ex.017.

[33] R.173-174; R.Ex.017-018.

of trust securing the debt. *Temples v. First Nat. Bank of Laurel*, 239 Miss. 446, 455, 123 So. 2d 852, 855 (1960). The Court did not hold that the reverse was true.

Although Temples does not answer the question before this Court, Section 15-1-75 of the Mississippi Code does. The statute states:

> In all cases where the interests are joint, one shall not be barred because another jointly interested is, *and the statute of limitations provided in this chapter shall be severally applied, and not jointly*, to the right of actions, in whatever cause, pertaining to each of all the parties, though jointly interested. (emphasis added).

This statute begins with the recognition that statutes of limitation run against parties *individually*. It then presses home the point by providing that even when parties are jointly interested, the statute of limitation still runs against them separately:

Here, Mr. Avakian signed a promissory note and thereby became indebted to the lender. Whatever claim that lender (or its successor) had against his estate on the note was subject to its own statute of limitation (*i.e.*, Section 15-1-25).

Before the lower court, Wilmington Trust relied heavily upon *Gates v. Chandler*, 174 Miss. 815, 165 So. 442 (Miss. 1936), and it will presumably do so on appeal. So, Mrs. Avakian will briefly address it.

In that case, Gates borrowed money from Chandler. Gates gave Chandler a promissory note and a deed of trust on some land owned by Gates.

Three days before the statute of limitation would have run on the promissory note, Chandler commenced foreclosure proceedings against the land. Gates argued that the foreclosure could not continue because the statute had since expired.

On appeal, the Mississippi Supreme Court explained that:

> [W]here a proceeding to enforce a mortgage, deed of trust, or other lien on property is begun within the statutory period therefor no lapse of time thereafter, in the absence of laches, will bar its prosecution to a conclusion.

Gates, 165 So. at 443.

Thus, *Gates* stands for the unremarkable proposition that when a lender commences a foreclosure against a debtor prior to the running of the statute of limitation, the lender can complete that foreclosure even though the statute may run during the completion of the foreclosure.

Gates does not speak to the scenario at hand in these proceedings - - whether the commencement of foreclosure on property *of a non-borrower* could somehow toll the running of the statute of limitation on the lender's separate claim *against the borrower* on a promissory note.

The lower court also found it significant that Wilmington Trust's predecessor had started and stopped foreclosure proceedings before. Yet, as Mrs. Avakian noted in the lower court (and Wilmington Trust did not challenge her), Citibank voluntarily cancelled *all three foreclosures*.

A foreclosure proceeding that was started, but then cancelled by the lender, obviously has no effect on the parties' rights. Each time Citibank cancelled its foreclosure proceedings, it simply returned the parties to the *status quo*.

Returning to the example of a party filing a Complaint before the statute runs, if the party follows through and completes the action, the statute will have tolled during that time.

But, "when a party chooses voluntarily to dismiss the action, the complaint does not toll the running of the statute of limitations." *Lincoln Electric Co. v. McLemore,* 54 So.3d 833, 839 (Miss.,2010)

Citibank may very well have had a sound business reason for voluntarily cancelling each foreclosure. Or, it may have thought its foreclosure notices were erroneous or inaccurate.

The record simply does not provide an answer. But, those "partial" foreclosures did not toll the running of the statute.

For all of these reasons, the lower court erred in ruling that the running of Section 15-1-25 was tolled.

Issue Two: The lower court ruled that Mrs. Avakian could not rely upon the statute of limitation because she, as executrix, did not mail written notice to the lender of the opening of the estate and the need to file a claim. Was this error?

A. *Standard of review*

The lower court's legal ruling on estoppel was based upon undisputed facts. Therefore, on appeal, the standard of review of questions of law is *de novo. Powe, supra.*

B. *Whether the executrix's failure to mail notice to Citibank prevented the statute of limitation from running*

In its Opinion and Judgment, the lower court began by posing the question of whether Mrs. Avakian was estopped from invoking the statute of limitation because, as executrix, she did not send Citibank written notice of the opening of the estate. As it proceeded in it analysis, however, the court appeared to based its decision on statutory language. As a result, Mrs. Avakian will address both questions.

In reaching its conclusion, the lower court relied upon Miss. Code Ann. § 91-7-145(1), which states:

> (1) The executor or administrator shall make reasonably diligent efforts to identify persons having claims against the estate. Such executor or administrator shall mail a notice to persons so identified, at their last known address, informing them that a failure to have their claim probated and registered by the clerk of the court granting letters within ninety (90) days after the first publication of the notice to creditors will bar such claim as provided in Section 91-7-151.

Looking to *In re Estate of Ladner*, 911 So. 2d 673, 676 (Miss. Ct. App. 2005), the lower court interpreted the statute as mandating that the creditor be given written notice before the 90 days deadline in Miss. Code Ann. § 91-7-151 begins to run.[34] This statute provides:

> All claims against the estate of deceased persons, whether due or not, shall be registered, probated and allowed in the court in which the letters testamentary or of administration were granted within ninety (90) days after the first publication of notice to creditors to present their claim. Otherwise, the same shall be barred and a suit shall not be maintained

[34] R.176; R.Ex.020.

> thereon in any court, even though the existence of the claim may have been known to the executor or administrator.

The chancellor is correct in his reading of *Estate of Ladner,* but that case only stands for the proposition that a known creditor will not be barred by the 90 day deadline in Section 91-7-151. It does not stand for the proposition that the underlying statute of limitation on the claim (in this case, Section 15-1-25) will not run.

Estate of Ladner was examined on this very point by the Court of Appeals in *In re Estate of Holmes*, 2015 WL 5102641, at *3-4 (Miss. Ct. App. Sept. 1, 2015), *reh'g denied* (Feb. 9, 2016), *cert. denied sub nom. Holmes v. Turner* (Miss. Apr. 21, 2016).

In *Estate of Holmes,* the Court of Appeals acknowledged the holding in *Estate of Ladner*. The Court explained, however:

> In their briefs, Becky and Brett have focused on the ninety-day period to probate a claim and whether proper notice was given. *See* Miss.Code Ann. § 91–7–145(2). But even if Brett never received proper notice—meaning section 91–7–145(2) did not mandate he file Jimmy's estate's claim by February 2011—he still had to pursue the claim within section 15–1–29's three-year statute of limitations. *See* Miss.Code Ann. § 15–1–29 (Rev.2012) (imposing a three-year statute of limitations for unwritten implied contracts).

Thus, while the failure of Mrs. Avakian to mail written notice to the lender would relieve the lender of the duty to comply with the 90 day deadline in Section 91-7-151, it would not excuse failure to meet the four year deadline imposed by Section 15-1-25.

Section 15-1-25 is clear and precise:

> An action or scire facias may not be brought against any executor or administrator upon any judgment or other cause of action against his testator or intestate, except within four years after the qualification of such executor or administrator.

It is the date of qualification of the executrix, not the date of mailing of notices to known creditors, that triggers the running of the statute.

To the extent the chancellor was addressing the common law of estoppel, Mrs. Avakian would note the following:

First, Wilmington Trust offered no evidence that (a) that Citibank did not have notice of the opening of the Estate or (b) that Citibank would have filed a timely suit had it received such a written notice.

Second, prior to October 26, 2014 (the date the statute of limitation expired), all of the following occurred:

a. JPMorgan sent a letter addressed to "Estate of N. Avakian" at Mrs. Avakian's home address;[35]

b. Citibank's lawyer deposed Mrs. Avakian, and she testified about Mr. Avakian's passing;[36]

c. The Pretrial Order in *Avakian v. Citibank* noted that an estate for Norair Avakian had been opened "in Lowndes County, Cause No. 2010-0115-B, and Burnette Avakian was appointed the Executrix of the estate;"[37] and

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[35] R.149.

[36] R.144.

[37] R.147.

d. JPMorgan filed the Statement of Claim in this very Estate proceeding.[38]

The cornerstone of equitable estoppel is (1) proof that a person has changed his position in reliance upon the conduct of another and (2) that he has suffered detriment caused by his change of his position in reliance upon such conduct. *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 206 (Miss. 1984). Here, Wilmington Trust offered the lower court no such evidence.

Further, there is no equitable exception to the running of the four year statute. *See Toler v. Wells*, 130 So. 298 (Miss. 1930). In *Toler*, the Mississippi Supreme Court held that an executrix was not estopped from invoking the statute of limitation even where she had previously admitted the validity of the debt.

For all of these reasons, neither statute nor common law prohibited Mrs. Avakian from invoking the statute of limitation.

Conclusion

Appellant Burnette Avakian, as executrix of the Estate of Norair Avakian, requests that this Court reverse the September 8, 2015 Opinion and Judgment of the Chancery Court of Lowndes County, Mississippi, and render judgment in her favor, holding that the claim of Appellant Wilmington Trust, N.A., on the promissory note is barred by the statute of limitation.

[38] R.40.

Respectfully submitted, this the 5th day of May, 2016.

BURNETTE AVAKIAN, EXECUTRIX OF THE ESTATE OF NORAIR AVAKIAN, DECEASED

/s/ S. Craig Panter
S. Craig Panter, her attorney

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CERTIFICATE OF SERVICE

I, S. Craig Panter, attorney for Appellant, certify that I have this day served a copy of this Brief of Appellant *via* the Mississippi Electronic Courts system which will provide a copy to following persons at these addresses:

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SO CERTIFIED, this the 5th day of May, 2016.

/s/ S. Craig Panter
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