

IN THE SUPREME COURT OF FLORIDA

BOLLETTIERI RESORT VILLAS  
CONDOMINIUM ASSOCIATION, INC.

Petitioner,

vs.

Case No. SC16-1680  
DCA Case No. 2D15-3186  
L.T. Case No. 2013-CA-708

THE BANK OF NEW YORK  
MELLON, etc.,

Respondent.

\_\_\_\_\_ /

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## STATEMENT OF THE CASE AND FACTS<sup>1</sup>

This appeal is about pleading—not evidence. The Court's decision in *Bartram v. U.S. Bank, N.A.*, --- So. 3d ---, 2016 WL 6538647 (Fla. Nov. 3, 2016), confirms BoNYM may foreclose the mortgage. The only question this Court must answer is whether BoNYM sufficiently pled foreclosure was timely.

The rules of civil procedure dictate pleadings be construed to do substantial justice. By alleging non-payment continued to case inception, BoNYM necessarily asserted a non-payment default within 5 years of filing. The continued non-payment was undisputed at trial. Ignoring this, Bollettieri asks this Court to place form over substance and mandate dismissal merely because non-payment began more than 5 years ago. This tortured view creates nothing but an unjustified windfall to defendants below. The opinion should be affirmed.

This is a residential mortgage foreclosure action. The original lender filed a previous action in February 2008. [V1 138.] That complaint alleged the loan was in default for the September 1, 2007 payment "and all payments due thereafter" and sought a judgment for the full amount due under the loan. [V1 138.] The case was dismissed in May 2011 without prejudice. [V1 136.]

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<sup>1</sup> All record references are to volume and page number (*e.g.* [V1 1] references Record Volume 1, page 1). BoNYM references respondent The Bank of New York Mellon, etc. Bollettieri references petitioner Bollettieri Resort Villas Condominium Association, Inc.

BoNYM filed this action in January 2013. [V1 2-6.] Like the prior action, BoNYM asserted "[t]he installment payment of September 1, 2007, was not paid[ ] and no subsequent payments have been made" and sought a judgment for the full amount due under the loan. [V1 2-4.] A default was entered against the borrower, and no defense related to the adequacy of the breach letter was ever lodged. [Progress Dkt. 4 (borrower defaulted); V1 90-100 (no defense related to the breach letter raised by Bollettieri).]

The case went to trial on June 16, 2015, solely on Bollettieri's statute of limitations affirmative defense. [Supp. R. 14-15.] The court found the action was not time-barred and entered judgment for BoNYM. [Supp. R. 15-23; V1 171-175.]

The Second DCA affirmed. The opinion states: "Although we agree with the Fifth District [in *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957, 959 (Fla. 5th DCA 2015)], that a foreclosure action must be based on a default that occurred within the five-year statute of limitations period, we disagree that a complaint alleging that the homeowners are in a continuing state of default at the time of filing fails to satisfy this requirement." *Bollettieri v. The Bank of New York Mellon*, 198 So. 3d 1140, 1142 (Fla. 2d DCA 2016). The opinion then confirms Bollettieri did not dispute the non-payment default or that payments have not been made since September 2007. *Id.* And, BoNYM's affirmative allegation of a continuous default was "sufficient to establish that foreclosure could be based on

any of the missed payments since the initial breach . . ." *Id.* The case was not barred, and the court certified conflict with *Hicks* to the extent of a conflict. *Id.*

### **STANDARD OF REVIEW**

Whether the statute of limitations bars this case is an issue of law subject to *de novo* review. *Bartram*, 2016 WL 6538647, at \*8.

### **SUMMARY OF THE ARGUMENT**

Bollettieri needlessly places form over substance. There is no single non-payment default basing this foreclosure. It is "based" on BoNYM's choice to exercise its acceleration option following the continued failure to make loan payments. Alleging—and later proving—non-payments continued through case inception is sufficient to withstand the statute of limitations defense. Having timely sued, BoNYM is entitled to judgment for the full amount secured by its lien.

Judgment for BoNYM also should be upheld under case law—untouched by *Bartram* or *Singleton*—that an exercised optional acceleration rather than non-payment defaults starts the limitations clock. This case was filed within 5 years of exercised acceleration. There was never any statute of limitations concern.

## ARGUMENT

### **I. BONYM FILED ITS CASE WITHIN THE APPLICABLE STATUTE OF LIMITATIONS PERIOD.**

#### *A. Limitations Statute Met Where Defaults Continue To Case Inception.*

This appeal presents a pleading issue. It is undisputed that no payments have been made since September 2007—and 60 of those payments were missed less than 5 years prior to commencement. Bollettieri asks this Court to pronounce a mandate of dismissal simply because the complaint dared to mention the non-payments began more than 5 years ago. This approach cannot be reconciled with the precedent of this Court, the rules of civil procedure, or common sense.

A mortgage foreclosure has a 5-year statute of limitations period from the date of accrual. *See* §§ 95.11(2)(c), FLA. STAT. In *Bartram*, this Court concluded, "[w]ith each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage." 2016 WL 6538647, at \*8 (emphasis added).<sup>2</sup>

Bollettieri focuses the Court only on the initial non-payment default [Pet. Br. at 10], ignoring that, by asserting the non-payment defaults were continuing,

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<sup>2</sup> While *Bartram* suggests non-payment defaults trigger the foreclosure statute of limitations, other case law and the underlying contract confirm more specifically that a pre-maturity foreclosure seeking judgment for the full debt owed does not accrue until an acceleration election. Because *Bartram* is not yet final, this issue is further explored in Part IV below.

BoNYM actually alleged 65 non-payments—each of which provided BoNYM with "the right . . . to accelerate" and foreclose. *See Bartram*, 2016 WL 6538647, at \*8. Of those 65 missed payments, 60 were within 5 years of case inception.<sup>3</sup> Bollettieri concedes this point, admitting only those payments due September 2007 through January 2008 might be barred by the statute of limitations. [Pet. Br. at 17.]

Rule 1.110(b), FLA. R. CIV. P., requires the complaint to contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Alleging generally that the non-payment defaults are continuing satisfies this standard, particularly considering "brevity, clarity and simplicity are [] the goals. Prolixity is forbidden." Author's Comment—1967 to Rule 1.110, FLA. R. CIV. P. (citing *Anderson v. Groveland*, 113 So. 2d 569, 570 (Fla. 2d DCA 1959)).

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<sup>3</sup> BoNYM does not agree a non-payment breach must occur post-dismissal under *Bartram*. [Pet. Br. 13.] As an initial matter, pre-maturity acceleration election rather than non-payment defaults trigger the foreclosure statute of limitations. *See* Part IV, below. Even if non-payment default date timing is material, this Court confirmed a foreclosure may be refiled on the same default post-dismissal. *Bartram*, 2016 WL 6538647, at \*9 ("[A] dismissal without prejudice would allow a mortgagee to bring another foreclosure action premised on the same default . . . ."); *see also Desylvester v. Bank of New York Mellon*, No. 2D15-5053, 2017 WL 694572 (Fla. 2d DCA Feb. 22, 2017) (affirming judgment on re-filed foreclosure alleging pre-dismissal non-payment defaults). *Singleton* too concerned a subsequent foreclosure basing on a non-payment default that would have occurred while the prior foreclosure was pending. *See* Petitioners' Amended Initial Brief, available at 2003 WL 23306509, at \*1. Finally, even if a post-dismissal default was a requirement, BoNYM met it because 20 of the alleged defaults post-date the May 2011 dismissal. [V1 2.]

There is no reason BoNYM is required to allege in detail the 65 months of non-payment breaches. This Court's approved foreclosure complaint form, which is "sufficient for the matters . . . covered by [it]," instead, approves alleging "all subsequent payments." See Form 1.944(a) (Mortgage Foreclosure) & Rule 1.900(b), FLA. R. CIV. P.<sup>4</sup>

The Second DCA's reliance on "all subsequent payments" language aligns with the Third DCA's approach in *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So. 3d 938, 946 (Fla. 3d DCA 2016). The Third DCA held there that, following dismissal of a foreclosure action, a subsequent action would not be barred by the statute of limitations so long as it alleged a non-payment default occurring subsequent to the default at issue in the dismissed foreclosure and "within five years of the subsequent action and acceleration." *Beauvais*, 188 So. 3d at 944-45. Although the initial non-payment default in *Beauvais* was over 5 years old, because the complaint alleged failure to pay "all subsequent payments," the rule was met. *Id.* at 945; see also *Dhanasar v. JPMorgan Chase Bank, N.A.*, 201 So. 3d 825, 826 (Fla. 3d DCA 2016) (despite the initial non-payment default occurring more than 5 years before case commencement, "[b]ecause the Bank's complaint specifically alleged that Dhanasar had failed to pay the April 2008

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<sup>4</sup> The approved use of "all subsequent payments" language from Form 1.944 dates back to at least 1968. See *In re Fla. R. Civ. P.*, 211 So. 2d 174, 189 (Fla. 1968).

payment and all subsequent payments . . . the action survived the asserted statute of limitations bar") (emphasis in original).

Bollettieri ignores this common-sense approach, arguing the action must be barred because it "includ[es] defaulted payments that were older than five years." [Pet. Br. at 10.] In other words, Bollettieri admits some of the missed payments are within the limitations period but argues dismissal is mandated because not all of the alleged missed payments are within that span. This position cannot be reconciled with the rules of civil procedure. "When 2 or more statements are made in the alternative and 1 of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of 1 or more of the alternative statements." Rule 1.110(g), FLA. R. CIV. P. That is, so long as 1 missed payment is within the limitations period—and that payment if pled independently would be sufficient to state cause of action—the complaint is not insufficient because an alternative missed payment is outside the period. This simple rule invalidates Bollettieri's entire argument.

*B. "Eviscerated" SOL Concerns Are Overblown.*

Bollettieri argues that permitting the allegation of a continuing default effectively eliminates the statute of limitations. [Pet. Br. 23-24.] This is both untrue and the same red herring this Court already resolved in *Bartram*.

What Bollettieri forgets is that, while there is a 5 year statute of limitations, the note and mortgage are 30-year obligations. Although it is agreed the borrower will make monthly installment payments, the total amount owed under the note does not become due until maturity. [V1 32 ¶ 3(A).] And, everything due under the note is secured by the mortgage. [V1 9.] It is not surprising that a lender's right to foreclose continues to accrue for statute of limitations purposes through maturity in year 30. It is consistent with the parties' agreement.

That the repose and limitations statutes may finally expire on the same date is immaterial. Both are legislative matters serving separate functions.

The statute of limitations is a procedural statute cutting off the time in which an accrued cause of action may be brought. *See Houck Corp. v. New River, Ltd.*, 900 So. 2d 601, 603 (Fla. 2d DCA 2005). It "does not affect the life of the lien or extinguish the debt." *Id.* So, even if the statute of limitations has run for a particular cause of action, the lien survives.

A statute of repose is substantive and "establishes an ultimate date when the [mortgage] lien . . . terminates and is no longer enforceable." *Id.* Rather than controlling the time to sue on an accrued cause of action, it "prevents" the cause of action from accruing "where the final element necessary for its creation occurs beyond the time period established by the statute." *Id.* (quotations omitted).

## II. DISMISSAL IS NOT MANDATED.

Bollettieri insists *Hicks v. Wells Fargo Bank, N.A.*, 178 So. 3d 957 (Fla. 5th DCA 2015), and *Collazo v. HSBC Bank U.S.A, N.A.*, --- So. 3d ---, 2016 WL 6246446 (Fla. 3d DCA Oct. 13, 2016), mandate dismissal. [Pet. Br. 14, 20.] Bollettieri is wrong. Neither of these cases addressed whether pleading (and later proving) the borrower missed "all subsequent payments" was sufficient to satisfy the statute of limitations.

*Hicks*, as here, alleged the non-payment defaults were continuing. 178 So. 3d at 958. The homeowners argued, because the second foreclosure was filed more than 5 years after the loan had been accelerated by the first foreclosure, the second foreclosure was out of time. 178 So. 3d at 959. The bank argued, following dismissal of the first foreclosure, acceleration was revoked, and the bank could again accelerate and bring a second foreclosure for all amounts owed, including amounts owed back to the initial date of default. *Id.* Judgment was entered in the bank's favor. *Id.*

On appeal, the Fifth DCA never examined whether pleading "all subsequent payments" was sufficient to survive the statute of limitations. Because the bank's trial counsel stipulated that the foreclosure was based on "an alleged default" occurring more than 5 years prior to case inception, the court instead reversed

judgment of foreclosure, concluding the foreclosure was "based on a default that occurred outside of the five-year statute of limitations period." *Id.*

This conclusion highlights the first non-payment event, ignoring the years of non-payments pre-dating the foreclosure—at least 60 of which came within 5 years of the complaint filing. More importantly, it ignores that the bank was not seeking a pre-maturity judgment for the full amount due based on a single non-payment, but based on a continuous default, not cured.

The court's emphasis on a single non-payment appears to have resulted from the bank's trial stipulation that there was "a default on the loan" rather than the continuous defaults alleged in the complaint. *Id.* at 959. To the extent *Hicks* may be limited to a foreclosure based solely upon and for a stipulated, single, non-payment default occurring more than 5 years preceding acceleration and foreclosure filing, then *Bollettieri* and *Hicks* can be reconciled.

Like the stipulation in *Hicks*, the *Collazo* court found the two foreclosures "asserted the same payment default date and basis for acceleration," which was "a date" more than 5 years prior to re-foreclosure commencement. 2016 WL 6246446 at \*1. The court reversed for dismissal without prejudice. *Id.*

*Collazo*, like *Hicks*, never examined whether pleading "all subsequent payments" satisfied the statute of limitations. It either placed too much emphasis on the initial non-payment event, ignoring the years of non-payments predating

acceleration and foreclosure, or, like *Hicks*, may be the result of trial evidence presenting only a single, non-payment default. *See id.* at \*2 (the bank "insisted on trying the case on the basis of [...] a stale default outside the limitations period") (Shepherd, J., concurring). On that basis, it can be reconciled with *Bollettieri*.<sup>5</sup> *See Desylvester v. Bank of New York Mellon*, No. 2D15-5053, 2017 WL 694572 (Fla. 2d DCA Feb. 22, 2017) (distinguishing *Collazo* on that basis and relying on *Bartram* and *Bollettieri* to uphold judgment for the note holder despite the initial pled default being more than 5 years old).

To the extent dismissal in *Hicks* or *Collazo* was prompted by use of the "same" non-payment default (rather than merely not alleging a non-payment default within 5 years of acceleration and foreclosure), that finding also is in error. A dismissal without prejudice has no *res judicata* effect. *See Froman v. Kirkland*, 753 So. 2d 114, 116 (Fla. 4th DCA 1999) ("A voluntary dismissal without prejudice will not support a claim of *res judicata*."); *Hunnewell v. Palm Beach Cty.*, 925 So. 2d 468, 479 (Fla. 4th DCA 2006) (dismissal for lack of prosecution is without prejudice and not *res judicata*). As this Court recently stated, "a dismissal without prejudice would allow a mortgagee to bring another foreclosure action

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<sup>5</sup> *Collazo* must be so limited because, to the extent it was proven the non-payment defaults were continuing, *Collazo* would conflict with *Beauvais* and *Dhanasar*, which both support allowing a foreclosure to proceed despite an initial non-payment more than 5 years old if the non-payments are continuing. Notably too, the foreclosing plaintiff in *Collazo* never filed any brief or otherwise made any argument during the appeal. 2016 WL 6246446, at \*1 n.2.

premised on the same default" so long as the new suit was still brought within the statute of limitations. *Bartram*, 2016 WL 6538647, at \*9.

### **III. *BOLLETTIERI* IS NOT ABSURD.**

Bollettieri argues the Second DCA reached an absurd result that allows a lender to foreclose anytime up to 5 years after maturity of the note. [Pet. Br. at 22-24.] This is not a holding of *Bollettieri*, but of *Bartram*. In *Bartram*, this Court held a lender can accelerate and commence a mortgage foreclosure within 5 years of any missed payment. If that missed payment occurs in year 29 the lender can still foreclose—which is exactly what the parties' agreement provides. When two people contract for a 30-year relationship, there is nothing absurd about enforcing that relationship into year 30.

Any assertion that some portion of interest owed BoNYM should be reduced from the foreclosure judgment because it came due 5 years prior to commencement has no basis in law. [Pet. Br. 3.] The statute of limitations merely controls the time in which an accrued cause of action may be brought. *See Allie v. Ionata*, 503 So. 2d 1237, 1240 (Fla. 1987). BoNYM's remedy—as is applicable here—is controlled by contract. *See, e.g., Indian River Colony Club, Inc. v. Schopke Constr. & Eng'g, Inc.*, 592 So. 2d 1185, 1186 (Fla. 5th DCA 1992) ("Where the parties to a contract have agreed to the consequences of a breach, their agreement

will control provided the remedy is mutual, unequivocal and reasonable.") (internal quotations omitted).

Once a foreclosure is brought within the applicable statute of limitations, the correct judgment is for the entire amount secured by the mortgage, *i.e.*, the unpaid principal balance, unpaid interest on the unpaid principal balance, and charges. [V1 20 (¶22) ("If the default is not cured . . . , Lender at its option may require immediate payment in full of all sums secured by this Security Instrument . . . ."); V1 33 ("If I am in default, . . . the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount.").]

Whether the statute of limitations may have run on any particular installment payment is immaterial. This is not an action to recoup missed installment payments under the note. BoNYM elected, instead, to declare the total due and pursue a foreclosure judgment on the amounts secured. *See Aluia v. Dyck-O'Neal, Inc.*, 205 So. 3d 768, 773 (Fla. 2d DCA 2016) ("A judgment of foreclosure is a judgment in rem or quasi in rem that directs the sale of the mortgage property to satisfy the mortgagee's lien."); *see also* [V1 3 (seeking a judgment for \$535,000 in unpaid principal, interest from August 1, 2007 to date, and other charges / expenses); V1 183 (judgment for the unpaid principal balance, interest from August 1, 2007 through June 16, 2015, and charges).] And, until the total amount

due is paid (including interest and charges), the lien continues to secure the full amount of the "Loan," which is defined as "the debt evidenced by the Note, plus interest, any prepayment charges and late charges under the Note, and all sums due under this Security Instrument, plus interest." [V1 8-9 & 20 (¶ 23) (providing for a release of the lien only for payment of all sums secured by the mortgage).]

This approach is consistent with *Bartram*, where this Court stated "[o]nce there [are] future defaults . . . the Bank has the right to file a subsequent foreclosure action—and to seek acceleration of all sums due under the note—so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default." *Bartram*, 2016 WL 6538647 at \*10 (emphasis added); *see also Nationstar Mortg., LLC v. Brown*, 175 So. 3d 833 (Fla. 1st DCA 2015) (recognizing that "a lender's acceptance of payments in installments does not eliminate the borrower's ongoing liability for the entire amount of the indebtedness"). No matter what missed payment is sued-upon, so long as it is timely, all sums due under the note—no matter when they came due—can be accelerated and included in the judgment.

#### **IV. ACCELERATION TRIGGERS STATUTE OF LIMITATIONS.**

There is another reason judgment for BoNYM should be upheld—the foreclosure action was brought within 5 years of exercised acceleration.

*A. Foreclosure Claim Accrues At Exercised Acceleration.*

The limitations statute governs the life of an accrued cause of action. *See* § 95.031, FLA. STAT. ("[T]he time within which an action shall be begun under any statute of limitations runs from the time the cause of action accrues.").

While recent case law emphasizes non-payment default date timing, this is an incorrect limitations statute trigger. A foreclosure seeking judgment for the total due does not accrue at non-payment. The lender must first either wait for maturity or affirmatively accelerate. This is because pre-maturity acceleration is not self-effectuating following a non-payment default. [V1 20 ¶ 22 ("If the default is not cured . . . Lender at its option may require immediate payment in full . . . .") (emphasis added)]; *see also Greene v. Bursey*, 733 So. 2d 1111, 1114 (Fla. 4th DCA 1999) ("[T]he entire debt does not become due on the mere default of payment; rather, it become[s] due when the creditor takes affirmative action to alert the debtor that he has exercised his option to accelerate.").

This is recognized in *Singleton v. Greymar*, 882 So. 2d 1004, 1008 (Fla. 2004): "the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." (emphasis added).

And, this is why—until recent *dicta* related to re-filed foreclosures muddied the water—the law in Florida was well-settled that the statute of limitations for pre-maturity foreclosing did not begin running until acceleration; the timing of non-payment defaults prompting acceleration simply did not matter. *See, e.g., Snow v. Wells Fargo Bank, N.A.*, 156 So. 3d 538, 541 (Fla. 3d DCA 2015) ("A cause of action on an accelerated debt accrues, and the statute of limitation commences, when the lender exercises the acceleration option and notifies the borrower of this exercise."); *Greene*, 733 So. 2d at 1114 (same); *Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993) (same); *Locke v. State Farm Fire & Cas. Co.*, 509 So. 2d 1375, 1377 (Fla. 1st DCA 1987) (same).<sup>6</sup>

By beginning the statute of limitations at non-payments, the Court is essentially requiring acceleration within 5 years. But, there is no time frame to accelerate. The mortgage expressly states acceleration is at the lender's option, which is not waived through forbearance or delay. [V1 16-17, 20 (¶¶ 12, 22).]

The trend toward default-based statute of limitations triggers traces to the following *Singleton* language: "While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent

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<sup>6</sup> *See also Houck*, 900 So. 2d at 605 (stating the foreclosure causes of action in *Monte* and *Pitts v. Pastore*, 561 So. 2d 297 (Fla. 2d DCA 1990), had "not yet begun to accrue" despite the fact that the alleged initial default dates in those cases were over 5 years old when the foreclosure actions were filed).

and different defaults present a separate and distinct issue." 882 So. 2d at 1007. This discussion relates to whether the two foreclosure actions were barred by *res judicata*. *Singleton* was not concerned with the time for bringing accrued causes of action (or defining when a foreclosure cause of action accrues) but rather whether the already accrued causes of action were the same for *res judicata*.

As discussed above, language within *Bartram* also reflects an emphasis on non-payment default timing. But, *Bartram* was decided in the context of a quiet title action filed more than 5 years after the bank attempted to accelerate the loan through a foreclosure that was later dismissed. 2016 WL at 6538647, at \*3-4. There, the borrower sought to cancel the mortgage, arguing the statute of limitations barred the bank from attempting to foreclose again. *Id.* Though conceding it could not foreclose on defaults preceding the first case, the bank nevertheless argued it could foreclose again based on non-payments occurring after the dismissed case. *Id.* at \*4. With this concession in hand and based on the certified question, limiting the issue to whether the statute of limitations prevented a subsequent foreclosure based on payment defaults occurring after dismissal of the first suit, this Court confirmed: **(1)** the dismissal revoked the attempted acceleration and the loan returned to installment payment status; and **(2)** the statute of limitations would not bar a successive foreclosure premised on a "separate and

distinct default" "as long as the alleged subsequent default occurred within five years of the subsequent foreclosure action." *Id.* at \*1, \*8.

There is no direct discussion of foreclosure claim accrual. It seems unlikely the Court intended to alter years of jurisprudence—and the parties' contract—and subtly pronounce a pre-maturity foreclosure seeking judgment for the total debt accrues at some point prior to exercised acceleration. Other language within *Bartram* confirms acceleration remains a critical element to cause of action accrual. *See id.* at \*6 (*Singleton* was "based on the conclusion that an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue than a foreclosure action and acceleration based on the same default at issue in the first foreclosure action") (quotations omitted).

Placing the foreclosure statute of limitations trigger on non-payments begins the limitations clock on a component part of the process rather than claim accrual. It essentially places a time frame to both accelerate and file rather than filing only. This cannot be correct because the statute of limitations applies only to claim filing, *see* § 95.031, FLA. STAT., and neither the statute nor the underlying contract provide a time frame to attempt acceleration.

*B. Dismissal Without Prejudice Does Not Preclude This Foreclosure.*

*Bartram* clarifies that: "after the dismissal, the parties are simply placed back in the same contractual relationship as before, where the residential mortgage

remained an installment loan, and the acceleration of the residential mortgage declared in the unsuccessful foreclosure action is revoked." 2016 WL 6538647, at \*8; *see also Brown*, 175 So. 3d at 834-35 ("After the dismissal without prejudice, the parties returned to the status quo that existed prior to the filing of the dismissed complaint."); *Beauvais*, 188 So. 3d at 946 ("[U]pon dismissal, acceleration of a note and mortgage is abandoned with the parties returned to the status quo that existed prior to the filing of the dismissed action . . . .").

After dismissal—and consistent with the borrower's reinstatement rights post-exercised acceleration—the borrower may continue making installment payments through maturity.

It is undisputed Mr. Graham did not reinstate. The January 2013 foreclosure complaint again accelerated the loan, triggering a new statute of limitations deadline on a different default period from that at issue in the dismissed foreclosure, *i.e.*, September 1, 2007 – May 2011 as opposed to September 1, 2007 – June 16, 2015. *See, e.g., Olympia Mortg. Corp. v. Pugh*, 774 So. 2d 863, 867

(Fla. 4th DCA 2000). Because the initial non-payment default date is immaterial for statute of limitations purposes, there is no limitations bar.<sup>7</sup>

## V. AFFIRMING JUDGMENT DOES NOT IMPACT BREACH LETTER

### A. Paragraph 22 Compliance Admitted.

BoNYM's compliance with mortgage paragraph 22 was admitted. Mr. Graham never raised any defense to the foreclosure and was defaulted. Even if Bollettieri could raise a paragraph 22 defense (which it cannot),<sup>8</sup> it did not. [V1 90-100.] The adequacy of the breach letter cannot be considered now for the first time. *See Perez v. State*, 919 So. 2d 347, 359 (Fla. 2005) ("For an issue to be preserved for appeal, . . . it must be presented to the lower court . . .").

Amicus Enrique Arevalo claims affirmance of *Bollettieri* would prevent a borrower from being able to defend a foreclosure by arguing he made the payment

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<sup>7</sup> *Bartram, Beauvais, Hicks, and Collazo* all concerned foreclosures filed, or anticipated to be filed, more than 5 years after the lender attempted to exercise its acceleration remedy through prior foreclosures. Because acceleration is cause of action accrual, whether acceleration was final and if a dismissal impacted acceleration was material to those cases. But not here. Even if the prior attempted acceleration remained material, this complaint was filed within 5 years of that attempt, and there is no statute of limitations issue. *See, e.g., Snow*, 156 So. 3d at 542 (second foreclosure was filed within the statute of limitations because it was filed within 5 years of acceleration through the first foreclosure).

<sup>8</sup> *LaFaille v. Nationstar Mortg., LLC*, 197 So. 3d 1246, 1247 (Fla. 3d DCA 2016) ("[N]either of the appellants was a party to, or a 'borrower' under, the mortgage or note, and thus, have no standing to assert this defense.") (citing *Clay Cty. Land Trust v. JPMorgan Chase Bank, N.A.*, 152 So. 3d 83 (Fla. 1st DCA 2014)).

the note holder had asserted as the basis for the foreclosure. [Amicus Br. at 3.] No payment or defense based on payment was made in this case.

Even so, only if Mr. Graham had cured his non-payment default as outlined in the breach letter would he have asserted an adequate defense. *See, e.g., Bank of New York Mellon v. Withum*, 204 So. 3d 136, 138 (Fla. 4th DCA 2016) (partial payments insufficient to cure the identified breach not a defense to foreclosure); *Stanley v. Bank of America, N.A.*, 199 So. 3d 409, 412 (Fla. 4th DCA 2016) (same). Whether the breach letter notified Mr. Graham of the right to cure his default through payment of only the September 1, 2007 payment as alleged by Mr. Arevalo [Amicus Br. 3] or (more likely) through payment of multiple months of missed payments, is unknown on this record.<sup>9</sup>

*B. Contractual Condition Precedent Unaffected By Limitations Period.*

Mr. Arevalo's fear of a lender sending a breach letter asserting only a continuous default rather than specifying the default and action required to cure the default is both factually and legally unfounded. [Amicus Br. 3-9]

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<sup>9</sup> Mr. Arevalo's contention that affirmance would somehow alter a note holder's proof of standing also goes too far. [Amicus Br. 9.] "[S]tanding is no more than having, or representing one who has, 'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So. 2d 1178, 1182 (Fla. 3d DCA 1985). Whether BoNYM had standing to foreclose at case commencement is in no way impacted by the accrual of the foreclosure cause of action and running of the statute of limitations.

A borrower's potential cure defense would remain despite affirmance of the judgment in this case. Mortgage paragraph 22's requirement to specify the default and action required to cure before opting to accelerate and foreclose is a contractual condition precedent to foreclosing. *See GreenTree Servicing, LLC v. Milam*, 177 So. 3d 7, 12-13 (Fla. 2d DCA 2015). Whether the note holder substantially complied with that requirement is the law, *id.*, regardless of whether the complaint was timely.<sup>10</sup>

The more compelling question is—can a default notice identify a breach and seek a cure amount that includes payments coming due more than 5 years before the breach letter was mailed. Paragraph 22 compliance was admitted, so the question is pure conjecture. But, the answer is an unqualified yes.

Mortgage paragraph 22 requires the note holder "**to specify (a) the default; (b) the action required to cure the default; (c) a date . . . by which the default must be cured; and (d) that failure to cure the default . . . may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property.**" [V1 20 (emphasis in original).]

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<sup>10</sup> *Broward County v. 8705 Hampshire Drive Condo., Inc.*, 127 So. 3d 853, 854 (Fla. 4th DCA 2013), does not support Mr. Arevalo's fear. [Amicus Br. 8.] In *Broward County*, the mortgage allowed acceleration based upon a breach of reporting covenants, which were demanded by the county in July 2003. *Id.* at 854. The statute of limitations for the breach began running in July 2003 and ran before the complaint was filed in October 2009. *Id.* The running of the statute of limitations—not non-compliance with a conditions precedent to foreclosing—prompted the Fourth DCA to affirm summary judgment for the appellee. *Id.*

The fact the statute of limitations may have run on a particular installment payment is irrelevant to whether the failure to make that payment was a "default" under the loan documents that may be noticed and made part of a cure requirement pursuant to mortgage paragraph 22.

The note states that, should Mr. Graham fail to "pay the full amount of each monthly payment on the date it is due, [he] will be in default." [V1 33 (¶6(B)).] Payment extensions do not release the borrower from liability, and any forbearance by the note holder in exercising its rights or remedies is not preclusive or a waiver of later exercising those rights. [V1 16-17 (¶ 12).] So long as the breach letter notified Mr. Graham of his non-payment default, BoNYM complied with mortgage paragraph 22 regardless of the date of the default.

Like Bollettieri, Mr. Arevalo's assertion that it is somehow "unfair" to allow a foreclosure to continue when the non-payments prompting it began more than 5 years ago ignores the underlying loan documents. [Amicus Br. 15.] Although the note holder has agreed to accept periodic payments, the borrower has agreed to repay the loan (including interest and charges) in full at maturity. [V1 32 (¶ 1), 8 (¶(E)).] The mortgage secures the entire debt. [V1 9, 14 (¶9).] The running of the statute of limitations on a particular installment payment does not release the lien for that payment. The lien for the entire debt remains until maturity. [*Id.*] There can be no unfairness to Mr. Graham in confirming this case—premised on an

admitted, continuous default that was not cured and on a loan that was still more than 29 years from maturity—was timely filed.

### **CONCLUSION**

*Bollettieri* presents a pragmatic, functional approach to confirming the action was brought within the statute of limitations. Reversing and finding this action barred by the statute of limitations merely because the complaint correctly stated the continuous non-payments began more than 5 years ago ignores the defaults pled and the law on pleading requirements.

The statute of limitations does not begin running until claim accrual anyway. Based on long-entrenched case law not addressed by *Bartram*, a pre-maturity foreclosure seeking a judgment for the full amount due accrues at exercised acceleration. This case was filed within 5 years of exercised acceleration. There can be no dispute this action is timely.

Respectfully submitted,

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I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

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