

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 CASE AND FACTS

This Court has jurisdiction and should review the Second DCA's decision¹ affirming the foreclosure judgment (the "**opinion**") because the district court ignored that statute of limitations are triggered by cause of action accrual. A lender or servicer must exercise the acceleration option before foreclosing for the full debt amount. Acceleration accrues a foreclosure claim, starting the statute of limitations clock. Defaults do not trigger the foreclosure statute of limitations, and missed individual installment payments may always prompt an optional acceleration regardless of their age.

The appeal is about a defaulted residential mortgage loan. The original lender filed a foreclosure action on February 1, 2008. [V1 138.] The foreclosure complaint accelerated the debt, alleged the September 1, 2007 payment "and all payments" had not been made, and sought the full amount due under the loan. [V1 138.] The case was voluntarily dismissed without prejudice. [V1 136.]

BoNYM filed a second foreclosure action on January 23, 2013. [V1 2-6.] Like the first complaint, BoNYM accelerated the debt, asserted the same non-payment defaults that began with the September 1, 2007 payment were continuing, and sought the full amount due under the loan. [V1 2-4.] Statute of limitations

¹ See *Bollettieri Resort Villas Condo. Ass'n, Inc. v. Bank of New York Mellon*, --- So. 3d ---, 2016 WL 4494792 (Fla. 2d DCA 2016).

was the only issue at trial. [Supp. R. 14-15.] Because the action was not barred, judgment was entered for BoNYM. [Supp. R. 15-23; V1 171-175.]

The Second DCA affirmed on appeal. In pertinent part, 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*, 2016 WL 4494792 at *2. 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.*

SUMMARY OF THE ARGUMENT

Requiring a foreclosure to "base" on a non-payment default occurring within the limitations period conflicts with established law that limitations periods run from cause of action accrual. A foreclosure cause of action seeking the full amount due under the loan before the loan's maturity date cannot be brought, *i.e.*, does not accrue, upon a mere non-payment default. The lender or servicer must

first exercise its acceleration option. If pre-maturity acceleration is exercised, then the statute of limitations runs five years from that date (absent a decelerating event such as reinstatement or dismissal returning the parties to their pre-foreclosure status quo). Looking back to non-payment defaults prompting acceleration or individual installments older than five years is immaterial to this analysis.

ARGUMENT

A. Opinion Conflicts With Several DCA and Supreme Court Opinions.

The opinion's affirmance departed from well-established statute of limitations accrual law (and its own precedent) by holding it "agreed" with *Hicks* that a foreclosure must be "based" on a default within the limitations period. Its eventual, and express, disagreement with *Hicks* on application of that rule also provides a basis for this Court to extend jurisdiction.

1. Defaults do not start the statute of limitations running.

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*.") (emphasis added). It is, thus, well-settled that it is not until all elements of the cause of action have occurred that the limitations period begins to run. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Lee*, 678 So. 2d 818, 821 (Fla. 1996) ("[A] cause of action cannot be said to have accrued . . . until an action may be brought.").

This is a foreclosure cause of action seeking the full amount due under the loan. [V1 2-4.] Because the loan would not mature until 2037 [V1 32], despite the non-payment defaults, BoNYM could not file this case until first exercising its acceleration remedy. This is because acceleration is *not self-effectuating* following a non-payment default. *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."). The lender must unequivocally inform the borrower that it has accelerated. *See id.*; *Snow v. Wells Fargo Bank, N.A.*, 156 So. 3d 538, 541-42 (Fla. 3d DCA 2015), *review denied* 177 So. 3d 1271 (Fla. 2015); *Central Home Trust Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1980).

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 the First, Third, and Fourth DCAs, as well as the Second DCA in *Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993), confirm the statute of limitations for pre-maturity foreclosing does not begin running until acceleration; the timing of non-payment defaults prompting acceleration simply

does not matter. *See, e.g., Snow*, 156 So. 3d at 541 ("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.");² *Greene*, 733 So. 2d at 1114 (same); *Locke v. State Farm Fire & Cas. Co.*, 509 So. 2d 1375, 1377 (Fla. 1st DCA 1987) (same).³

The opinion's attempt to tie limitations timing to a component part of the process (default) rather than the ultimate event accruing the claim (acceleration), conflicts with well-settled law and must be corrected. *See, e.g., Lee*, 678 So. 2d at 821 (although crash was more than five years old, statute of limitations did not bar action against insurer for failure to pay benefits because that action could not and did not accrue until the contract breach).

² Whether this remains the law in the Third DCA is unclear following the court's recent decision in *Dhanasar v. JPMorgan Chase Bank, N.A.*, No. 3D15-10 (Fla. 3d DCA Oct. 13, 2016). Even though the case did not concern a re-filed foreclosure, the court held that its *Beauvais* decision, addressed *infra* at p. 8-9, was applicable, and "[b]ecause the Bank's complaint specifically alleged that Dhanasar had failed to pay the April 2008 payment *and all subsequent payments*, and the action was filed within five years of a default payment, we agree with the trial court's conclusion that the action survived the asserted statute of limitations bar." *Id.* at 3-4. Judgment for the bank was affirmed. *Id.* at 4.

³ *See also Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 605 (Fla. 2d DCA 2005) (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 default dates in those cases were over five years old when the foreclosure actions were filed).

2. No "look back" to non-payment default timing.

The opinion's focus on default date timing appears based on a misunderstanding of the ordinary rule, that statute of limitations can run on some installment payments but not others. *See, e.g., Greene*, 733 So. 2d at 1114 ("Ordinarily, the statute of limitations under an installment contract starts to run on the date each payment becomes due."); *Lippincott*, 392 So. 2d at 933.

Like mortgage foreclosures generally, this is not a suit to recoup missed installment payments. This is a foreclosure for pre-maturity, accelerated debt. The debt cannot accelerate on its own—*i.e.*, the debt did not become due on the non-payment default. It becomes due at maturity (either through passage of time or an exercised acceleration option). *See Greene*, 733 So. 2d at 1114 ("[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.").

Correctly running the clock from claim accrual does not nullify the statute of limitations as some contend. A full-debt foreclosure can be filed in year 29 (or even year 35) after a borrower has been in non-payment default since year 1. This accurately reflects the underlying contract requires continuing obligations, and it is not until maturity many years later (potentially optionally exercised early) that the

entire debt becomes due. *See Singleton*, 882 So. 2d at 1007 (recognizing unique nature of mortgage and continuing obligations).

Not only that, but requiring a "look back" to non-payment defaults is contrary to case law that acceleration moves the maturity date forward. *See, e.g., Casino Espanol de la Habana, Inc. v. Bussel*, 566 So. 2d 1313, 1314 (Fla. 3d DCA 1990) (there can be no pre-payment penalty after the loan's maturity date is accelerated). Because accelerating starts the statute of limitations, there is no way to "base" a foreclosure on a non-payment occurring within the forward-facing limitations period because there are no loan payments "due" after maturity.⁴

3. Conflicts in application of default-basing rule.

Despite their foundational agreement, the Second and Fifth DCAs diverge on application of their new statute of limitation rule.

In this case, although the initial non-payment default was more than five years old, because the complaint alleged the default was continuing, the

⁴ The exception to this rule is when the acceleration (early maturity) is nullified through contractually-allowed reinstatement, voluntary deceleration or a foreclosure dismissal returning parties to pre-acceleration status. *See 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"); *Nationstar Mortg., LLC v. Brown*, 175 So. 3d 833, 833 (Fla. 1st DCA 2015) (dismissal returned the parties to their pre-complaint status); *Olympia Mortg. Corp. v. Pugh*, 774 So. 2d 863, 866 (Fla. 4th DCA 2000) (voluntary dismissal without prejudice was an optional abandonment of the lender's prior acceleration); *Slottow v. Hull Inv. Co.*, 129 So. 577, 582 (Fla. 1930) ("the mortgagee was entitled to waive its former election [to accelerate] . . .").

foreclosure could "be based on any of the missed payments since the initial breach," and judgment was affirmed. *Bollettieri*, 2016 WL 4494792, at *2.

In *Hicks*, the Fifth DCA found that, despite alleging continuous non-payment defaults, "the court erred when it failed to dismiss the foreclosure complaint with prejudice based on a default that occurred outside of the five-year statute of limitations period." 178 So. 3d at 959. These two outcomes conflict.

4. Conflict with *Collazo*.

Bollettieri argues the opinion conflicts with the Third DCA's *Collazo v. HSBC Bank USA, N.A.*, No. 3D14-2208, 2016 WL 1445419 (Fla. 3d DCA April 13, 2016), decision. (Petitioner Br. at 6.) Since Bollettieri's brief was filed, however, the Third DCA replaced its decision on rehearing. *See Collazo v. HSBC Bank USA, N.A.*, Case No. 3D14-2208 (Fla. 3d DCA Oct. 13, 2016). The opinion still conflicts.

Collazo is based on the Third DCA's *en banc* opinion from *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA 2016).

Beauvais is about the effect of a dismissal without prejudice of a first foreclosure on a subsequent case. The Third DCA held the dismissal reset the parties to the status quo that existed prior to filing the dismissed complaint. 188 So. 3d at 944. A subsequent foreclosure action could then be filed so long as it alleged a non-payment default that occurred both subsequent to the default at issue

in the dismissed foreclosure and "within five years of the subsequent action and acceleration." *Id.* at 944-45. Although the initial non-payment default in *Beauvais* was over five years old, because the complaint alleged the failure to pay "all subsequent payments," the rule was met. *Id.* at 945.⁵

In *Collazo*, despite the complaint alleging the non-payment defaults were continuing,⁶ the court found the subsequent foreclosure was not based on a non-payment default subsequent to that at issue in the dismissed foreclosure. Slip. Op. at 2-3. "As a result," the court reversed for dismissal without prejudice. *Id.* *Collazo's* dismissal is contrary to the opinion, which affirmed based on "all subsequent defaults" despite both foreclosures alleging the same initial non-payment default date.

B. No Other Basis For Jurisdiction.

Bollettieri argues this Court should exercise jurisdiction because the opinion "creates a Pandora's Box of issues for Plaintiffs." (Petitioner's Br. at 7-9.) This is merely a discussion on the impact of the above discussed conflicts and not a

⁵ As the above discussion illustrates, the Third DCA's attention to default date timing conflicts with statute of limitation accrual law. This Court stayed *Beauvais* prior to jurisdictional briefing, pending its determination in *Bartram v. U.S. Bank Nat'l Ass'n, et al* and related cases (Case Nos. SC14-1265, SC14-1266; SC14-1305). See SC16-732.

⁶ While the complaint allegation of defaulting on "all subsequent payments" is not clear from the opinion itself, the record confirms that is the case.

separate basis for this court to grant jurisdiction pursuant to Rule 9.030(a), Florida Rules of Appellate Procedure.

Bollettieri also argues the opinion "implicitly declared invalid section 95.11(2)(c) as it applies to foreclosure and consumer debt matters." (Petitioner's Br. at 9-10.) There is nothing in the opinion expressly or implicitly declaring section 95.11(2)(c) invalid. The opinion merely construes whether the cause of action was brought within the statutorily defined five-year limitations period, which it was.

CONCLUSION

This Court should exercise jurisdiction to clarify that, like all other Florida causes of action, the statute of limitations on a mortgage foreclosure starts when the claim accrues. Because most foreclosures seek the full debt pre-maturity, acceleration accrues the claim. This acceleration cannot be automatic following defaults, *i.e.*, not self-effectuating. Acceleration is an optional remedy that must be exercised before a pre-maturity foreclosure complaint can be filed.

If the Court ignores this settled precedent and creates a new rule for foreclosures alone, the conflict between the opinion and the Fifth and Third DCAs would necessitate accepting jurisdiction to explain the new rule.

Respectfully submitted,

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