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THE SUPREME COURT OF FLORIDA
Case No: SC16-1680

2nd DCA CASE NO.: 2D15-3186
LOWER TRIBUNAL NO.: 13-CA-708

BOLLETTIERI RESORT VILLAS CONDOMINIUM ASSOCIATION, INC.

Petitioner/Appellant

v.

THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, as trustee for the holders of the certificates, First Horizon Pass-Through Certificates Series FHAMS 2007-FA4, by First Horizon Home Loans, a division of First Tennessee Bank National Association, Master Servicer, in its capacity as agent for the trustee under the pooling and servicing, et al.

Respondents/Appellees.

BRIEF OF PETITIONER ON JURISDICTION

PETITION FOR REVIEW OF OPINION OF SECOND DISTRICT COURT OF APPEAL CERTIFYING CONFLICT WITH THE FIFTH DISTRICT COURT OF APPEAL AND AFFIRMING FINAL JUDGMENT OF THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY

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PETITIONER/APPELLANT BOLLETTIERI RESORT VILLAS CONDOMINIUM ASSOCIATION, INC.'S BRIEF ON SUPREME COURT JURISDICTION

COMES NOW. Petitioner/Appellant Bollettieri Resort Condominium Association, Inc., by and through its undersigned counsel, and files this, its Brief on Jurisdiction in the Florida Supreme Court. This Court should exercise its discretionary jurisdiction to hear this case because, as the Second District Court of Appeal expressly acknowledged in its opinion that Bollettieri now appeals, a certified direct conflict exists between the Second District's decision and the Fifth District's opinion in Hicks v. Wells Fargo Bank, N.A., 178 So.3d 957 (Fla. 5th DCA 2015) *see also* Fla. Const., Art. V, § 3(b)(3), Fla. R. App. R. 9.030(a)(2)(A)(iv) and 9.030(a)(2)(A)(vi). The opinion also conflicts with the opinions of the Third District, notably Collazo v. HSBC Bank USA, N.A., ---So.3d---, 2016 WL 1445419 (Fla. 3d DCA 2016). The opinion of the Second District also conflicts with decisions of the United States District Court, Middle District of Florida interpreting State law. The conflict involves an important question of law that in not only dispositive in this case, but also likely to recur in numerous other cases, such as those involving foreclosure of mortgages, association assessment collection and foreclosure and consumer debt collection.

INTRODUCTION

On May 24, 2007, Barry Graham ("Graham") executed and delivered a Promissory Note and Mortgage to First Horizon Home Loan Corporation in the amount of $535,000.00. Respondent subsequently became owner of the Note and Mortgage. Beginning September 1, 2007, Graham failed to make the monthly mortgage payments to Respondent. As a result of Graham's failure to make the monthly mortgage payments, Respondent filed suit to foreclose the mortgage on the Unit on January 23, 2013. At the time Respondent filed its foreclosure action, Bollettieri was the legal owner of the unit through its foreclosure action.

Respondent alleged in its suit the total accelerated amount owed by Graham was $535,000.00. Following several motions to dismiss and court orders, Bollettieri filed its Answer and Affirmative Defenses. Bollettieri asserted in its Affirmative Defenses that the foreclosure filed by the Respondent was barred by the statute of limitations, Section 95.11(2)(c).

Bollettieri moved for summary judgment on the basis of the foreclosure action being barred by the statute of limitations on May 22, 2015. Respondent filed its reply on May 29, 2015. On June 16, 2015, the Trial Court heard competing Motions for Summary Judgment from Bollettieri and Respondent. Bollettieri

argued that the foreclosure filed by the Respondent was barred by Section 95.11(2)(c) since it included payment defaults older than five years while Respondent argued that the payment defaults older than five years were permissible. Following argument on the competing Motions, the Trial Court entered the Final Judgment of Foreclosure in favor of the Respondent.

Bollettieri appealed the Final Judgment to the Second District Court of Appeal. After review of the briefs, and with the benefit of oral argument, the Second District affirmed the Final Judgment by holding that a foreclosure action can be based on payment defaults older than five years provided the complaint alleged the borrower was in a continuing state of default. The Court certified conflict with the Fifth District's decision in Hicks which reversed a final judgment of foreclosure and remanding for dismissal with prejudice when the complaint was based on a default outside of the five year limitations period.

SUMMARY OF ARGUMENT

The Court should take jurisdiction and resolve this acknowledged conflict not only because it is critical to the resolution of this case, but also because it is an important question that is likely to recur ever more frequently in all

manner of cases from mortgage foreclosures, association lien foreclosures, fair debt collection practice violations, deceptive and unfair trade practice violations, to a wide range of consumer finance and credit matters. The district court's pronouncement that a complaint can be based on defaults older than the limitations period as long as there is a continuing default alleged will cause inconsistent inter-district decisions on when a complaint is subject to dismissal. It will also create situations where a properly pled complaint may place the plaintiff in violation of fair debt and consumer protection laws. This will cause confusion among the courts and increase the amount of litigation and petitions to this Court as plaintiffs are held liable for violations of fair debt and consumer protection laws despite properly pleading a cause of action.

ARGUMENT

I. Bollettieri is in Certified Conflict with Hicks and Conflicts with Collazo

Pursuant to the Florida Constitution and Florida Rules of Appellate Procedure, This Court may "review a decision of a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of

appeal. This Court should accept jurisdiction and review this case because the district court's decision, holding that a suit may be based on a default outside of the limitations period so long as a continuing default is alleged, creates a three-way conflict between the district courts. This conflict will create inconsistent decisions on motions to dismiss, motions for summary judgment and defenses to claims by defendants that plaintiffs have violated fair debt and consumer protection laws. Thus, this case presents an issue of statewide application and importance that affects all areas of legal practice.

In certifying express and direct conflict with Hicks v. Wells Fargo Bank, N.A., 178 So.3d 957, 959 (Fla. 5th DCA 2015), the district court receded from recent precedent that a bank bringing a second or later foreclosure suit on the note and mortgage must base the default on a default that occurred within the five year limitations period. Evergrene Partners, Inc. v. Citibank, N.A., 143 So.3d 954, 956 (Fla. 4th DCA 2014)(claims to payment defaults older than five years may be subject to statute of limitations); U.S. Bank, Nat'l Ass'n v. Bartram, 140 So.3d 1007, 1014 (Fla. 5th DCA 2014)(subsequent foreclosure action permitted provided it is brought within the limitations period); Deutsche Bank Trust Co. Americas v. Beauvais, 188 So.3d 988, 941

(Fla. 3d DCA 2016)(five-year limitations period does not bar second suit based on default occurring within the limitations period); see also In re Anthony, 550 B.R. 577 (M.D. Fla. 2016)(internal citations omitted).

Additionally, the decision of the district court directly conflicts with Collazo v. HSBC Bank, USA, N.A., --- So.3d --- (Fla. 3d DCA 2016)(plaintiff cannot demand payments outside of limitations period in subsequent foreclosure). However, Hicks and Collazo reach different results in how to resolve the case when the bank has pled payment defaults outside of the limitations period, dismissal of the case versus remand to amend the final judgment respectively.

Thus, in addition to the district court being in conflict with both the fifth district and third district on whether a complaint can be based on payment defaults outside the limitations period, there is a three way split among the district courts as to the proper remedy when a bank bases a subsequent foreclosure suit on payment defaults outside of the five-year limitations period.

In entering the decision below, the district court contravened the cases that adhered to the principle that a subsequent foreclosure action had to be based on defaults that

were within the five-year limitations period. Accordingly, the conflict on the issue of whether a subsequent foreclosure action can be based on payment defaults outside the five-year limitations period will cause confusion and will lead to an increase in litigation and should be resolved by this Court.

II. Bollettieri creates a Pandora's Box of issues for Plaintiffs complying with fair debt and consumer protection laws and for courts enforcing these laws.

By conflicting with Hicks, the district court has created a Pandora's Box for plaintiffs to comply with fair debt and consumer protection laws. For instance, a plaintiff who filed a subsequent foreclosure suit and based it on payment defaults outside of the five-year limitations period, would be allowed to plead its case this way pursuant to Bollettieri but would also be at risk of being in violation of applicable fair debt and consumer protection laws for claiming debt older than five years that is barred by how federal district courts in the Middle District have applied Hicks. These fair debt and consumer protection laws include the Fair Debt Collection Practices Act, Florida Consumer Collection Practices Act and Florida Deceptive and Unfair Trade Practices Act. See Sanchez v. Rushmore Loan Management Services, LLC, No. 8:15-CV-2714, 2016 WL 3126515 at *4 (M.D. Fla. June 3, 2016).

In Sanchez, the defendant had sent a foreclosure notice to the plaintiff in July, 2015 and demanded payments due from April, 2009 to the present. Plaintiff filed suit against the defendant under the applicable fair debt and consumer protection laws for a misleading letter since it did not refer to a prior foreclosure suit and acceleration.

In denying the defendant's motion to dismiss, the district court held that the letter of the defendant failed to exclude payment defaults that exceeded the five-year limitations period. Therefore, at the early stage, the plaintiff's complaint was sufficient to allege a cause of action for violation of fair debt and consumer protection law.

Bollettieri creates the situation where a party can legally include payment defaults that are outside of the five-year limitations period in its lawsuit and yet be in violation of fair debt and consumer protection law despite the holding of the decision. Courts applying fair debt and consumer protection laws to the actions of a party will be faced with a situation where the actions of a party may or may not violate fair debt and consumer protection laws based solely upon where the action occurred within Florida.

Bollettieri also creates issues for federal district courts in the Middle District of Florida when applying Florida law as to whether a plaintiff can include payment defaults outside of the applicable limitations period. Since the Middle District encompasses courts in both the Second District and Fifth District, there is the real risk of the district courts in the Middle District reaching opposite conclusions on the application of the statute of limitations based solely on which division within the Middle District a suit is filed.

III. Bollettieri implicitly declares invalid Section 95.11(2)(c) as to foreclosures and consumer debt matters and inherently adopts Section 95.281 as the limitations period.

In adopting the holding in Bollettieri, the Second District has implicitly declared invalid Section 95.11(2)(c) as it applies to foreclosure and consumer debt matters. Currently, on installment contracts, the statute of limitations is governed by Section 95.11(2)(c) and that actions not brought on installment payments are barred when the applicable statute of limitations runs. Greene v. Bursey, 733 So.2d 1111, 1114 (Fla. 4th DCA 1999)(internal citations omitted).

However, by adopting the "continuing default" standard in Bollettieri, the Second District has eliminated Section 95.11(2)(c) as being applicable to consumer debt transactions as

long as a continuing default is alleged. By way of example, this means the applicable limitations period for mortgages is now the repose period in Section 95.281. It is now conceivable that a lender could bring a foreclosure action in year 29 of a 30-year mortgage and alleged and collect all prior installment payments provided that the lender alleged the borrower has been in default the entire time. The only bar to the lender's action would be the repose period under Section 95.281.

CONCLUSION

Because the Second District certified express conflict with the Fifth District, and because the decision conflicts with the decisions of other district courts, this Court has jurisdiction to review this matter. For the reasons stated above, the Court should exercise jurisdiction to consider the merits of Bollettieri's arguments.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing *Petitioner's Jurisdictional Brief* has been filed electronically with the Clerk of Court and to all parties this 28 day of September, 2016 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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