

THE SUPREME COURT OF FLORIDA

Case No: SC16-1680

SECOND DCA CASE NO.: 2D15-3186

LOWER TRIBUNAL NO.: 13-CA-708

BOLLETTIERI RESORT VILLAS CONDOMINIUM ASSOCIATION, INC.

Petitioner

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 agreement, and
Barry Graham**

Respondents

REPLY BRIEF OF THE PETITIONER

BOLLETTIERI RESORT VILLAS CONDOMINIUM ASSOCIATION, INC.

FRAZIER & BROWN LAW, PLLC
202 South Rome Avenue
Suite 125
Tampa, Florida 33606
Telephone 813-603-8600
Facsimile 813-603-8601
*Counsel for Bollettieri
Resort Villas Condominium
Association, Inc.*

By: 

Shawn G. Brown

FBN: 569135

shawn@frazierbrownlaw.com

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ARGUMENT¹

Contrary to the vociferous arguments from the Bank of New York, this case is not just simply about a pleading defect in the foreclosure action. This case is about the fundamental requirement of litigation in Florida that the cause of action is that is not barred by the statute of limitations. Bollettieri will only address the statute of limitations as it applies to defaults pled that are older than five years in its Reply Brief. The issue of the application of the statute of limitations to Paragraph 22 of a mortgage is addressed in the amicus brief.

Despite the machinations of the Bank of New York, the law is clear that when a cause of action is based on a default outside of the applicable statute of limitations, regardless of whether there has been a continuing default, the cause cannot be maintained as pled and dismissal is the appropriate action by a court. In the context of mortgage foreclosures, the subsequent foreclosure action must be brought "within the limitations period". This means the payment default for which recovery is sought in the complaint cannot be older than five years. A plaintiff cannot circumvent the statute of limitations on

¹ All references to Bollettieri shall mean the Petitioner, Bollettieri Resort Villas Condominium Association, Inc., and all references to Bank of New York shall mean the Respondent, The Bank of New York Mellon, etc.

installments on an installment contract by simply alleging that the borrower was in a continuous state of default since the first breach of the installment obligation. Accordingly, this Court should approve Hicks on the conflict issue and quash Bollettieri and remand this case to the Second District for proceedings consistent with this opinion.

I. A SUBSEQUENT FORECLOSURE ACTION CANNOT BE BASED ON PAYMENT DEFAULTS THAT ARE OUTSIDE THE APPLICABLE LIMITATIONS PERIOD

The Bank of New York overstates the issue in this appeal, focusing on the continuing nature of the default and ignoring the fact that the initial installment payment default plead was outside of the five-year limitations period under Section 95.11(2)(c). The Bank of New York would have this Court uphold the idea that by simply stating that a borrower was in a continued state of default that a plaintiff in a mortgage foreclosure can now recover installment payment defaults on an installment contract that are clearly barred by Section 95.11(2)(c).

Essentially, the Bank of New York is arguing that a plaintiff can recover installment payment defaults clearly outside of the limitations period by simply alleging there was a continuing default. Installment payments that are barred under

the statute of limitations are no longer barred as long as the continuing default is alleged.

It is undisputed that when a mortgage foreclosure action is dismissed that the parties are placed back into their pre-default position and the mortgage remains continues as an installment loan contract. Bartram v. U.S. Bank Nat'l Ass'n, -- So.3d --- 2016 WL 6538647, p. 19 (Fla. 2016). Under an installment contract, the statute of limitations begins to run on the date that each payment is due. Central Home Trust Co. of Elizabeth v. Lippincott, 392 So.2d 931 (Fla. 5th DCA 1980). See also Isaacs v. Deutsch, 80 So.2d 657, 660 (Fla. 1955). "And we think it is much more logical to hold that in a case such as this, as in the case of an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." See also Greene v. Bursey, 733 So.2d 1111, 1114-1115 (Fla. 4th DCA 1999).

The case of CCM Pathfinder Palm Harbor Management, LLC v. Unknown Heirs of Gendron, 198 So.3d 3 (Fla. 2d DCA 2015) showcases the fact that some installment payments of promissory note secured by a mortgage may be barred by the statute of limitations set out in Section 95.11(2)(c). "In the case of an

installment note, the right to foreclose accrues as to each installment on the date the installment becomes due." Id at 7. The issue before the Court in Gendron was the failure to make the final installment payment.

While the Gendron Court ultimately held that the statute of limitations was not a defense due to an agreement waiving the statute of limitations as defense, the Court did ultimately note that but for this agreement the complaint would have been barred by the application of Section 95.11(2)(c). "However, Pathfinder's foreclosure complaint was not filed until March 15, 2013—a date clearly after the expiration of the statute of limitations regardless of which date is used. Hence, it initially appears that Pathfinder's action is barred by the statute of limitations." Id.

In the current case, the Bank of New York clearly based its foreclosure action on defaults that were outside of the applicable five-year statute of limitations, the September, 2007 through January, 2008 installment payment defaults. The fact that the Bank of New York alleged a continuing default does not change the fact that the statute of limitations had expired for these installment payments.

This Court's recent decision in Bartram clearly noted that a subsequent foreclosure action could not be based on a default if the statute of limitations had run on that particular installment payment. "Once there were future defaults, however, the Bank had 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 at p. 23.

Despite the argument of the Bank of New York to the contrary, Florida courts have recognized that even though a subsequent foreclosure action may be brought, individual installment payments outside of the limitations period in Section 95.11(2)(c) are barred. Kaan v. Wells Fargo Bank, N.A., 981 F.Supp.2d 1271, 1274 (S.D.Fla. 2013); Evergrene Partners, Inc. v. Citibank, N.A., 143 So.3d 954, 956 (Fla. 4th DCA 2014); In re Anthony, 550 B.R. 577 (M.D. Fla. 2016); Stern v. Bank of America Corp., 112 F.Supp.3d 1297, 1300 (M.D. Fla. 2015); Collazo v. HSBC Bank, USA, N.A., --- So.3d --- 2016 WL 6246446 (Fla. 3d DCA 2016) and Deutsche Bank Trust Co. Americas v. Beauvais, 188 So.3d 938 (Fla. 3d DCA 2016).

The decision of the Second District in Bollettieri Resort Villas Condo. Ass'n, Inc. v. The Bank of New York, 198 So.3d 1140 (Fla. 2d DCA 2016) is incorrect in holding that a continuing default allows a plaintiff to include in its complaint installment payment breaches that are outside of the applicable limitations period. This Court made clear in Bartram that the subsequent foreclosure action could not be based on a default where the statute of limitations had run.

Hicks v. Wells Fargo Bank, N.A., 178 So.3d 957 (Fla. 5th DCA 2015) is correct in how it dealt with a foreclosure complaint that was based on defaults outside the five-year limitations period in Section 95.11(2)(c). The foreclosure action cannot be brought if defaults outside of the limitations period are included.

Bollettieri would also note that, contrary to the assertion of the Bank of New York in its Answer Brief [Resp. Br. 5], Bartram does not allow for a subsequent foreclosure action to be refiled with the same default following dismissal. In fact, this Court made it clear in Bartram that defaults prior to the first foreclosure action could not be sought. Bartram at p. 9, p. 16-17, p. 23. The Bank of New York filed its subsequent foreclosure action on the same default as in the prior

foreclosure action. [V.1 2-6, 136-138]. Pleading the same default date in a subsequent foreclosure action as in the prior foreclosure action is not permitted under this Court's holding in Bartram.

Both Hicks and Bartram are clear in that a mortgagee can bring a subsequent foreclosure action, and accelerate the entire mortgage debt, provided it is bases its complaint on payment defaults within the limitations period. This means that the complaint cannot include payment defaults that are older than five years. Once the plaintiff has properly alleged payment defaults that are not outside of the limitations period, then it can proceed to foreclose on its mortgage.

II. RULE 1.900(b) AND FORM 1.944(a) DO NOT RELIEVE A PLAINTIFF OF THE OBLIGATION TO PLEAD AN INITIAL DEFAULT THAT IS NOT BARRED BY THE APPLICABLE LIMITATIONS PERIOD

The Bank of New York states in its Answer Brief that it has complied with the Florida Rules of Civil Procedure and the forms promulgated within. Bollettieri has never questioned whether the Bank of New York complied with the Florida Rules of Civil Procedure nor has it sought to require the Bank of New York to allege each and every single default. What Bollettieri has sought to require from the Bank of New York is plead a

subsequent foreclosure that is not based upon a payment default that is not barred by Section 95.11(2)(c).

While Form 1.944(a) does require a plaintiff to plead a specific default date and any applicable default dates, the Form does not relieve a plaintiff from pleading a default date that is within the applicable limitation period. The Form simply relieves a plaintiff from the burden that the Bank of New York incorrectly states Bollettieri is seeking to impose, which is the specific detailing of each individual breach under the promissory note. A default date that is plead which is outside of the applicable limitations period is barred. Hicks v. Wells Fargo Bank, N.A., 178 So.3d 957 (Fla. 5th DCA 2015).

III. ALLOWING A PLAINTIFF TO PLEAD A "CONTINUING DEFAULT" TO INCORPORATE PAYMENT DEFAULTS BARRED BY THE STATUTE OF LIMITATIONS DOES EVISCERATE THE STATUTE OF LIMITATIONS IN MORTGAGE FORECLOSURE.

The Bank of New York overstates Bollettieri's argument that the ruling in Bollettieri eviscerated the statute of limitations. Under Bartram, the default in a subsequent foreclosure action must be based on a default on which the statute of limitations has not run. Bartram at 23. The evisceration in Bollettieri comes not from the acceleration seeking all sums due under the note, but rather from a plaintiff being able to ignore the plain fact that installment payments

that are barred under the statute of limitations can now form the basis of the cause of action.

As Deutsch, Gendron and Greene make clear, the statute of limitations begins to run on an installment obligation the date it becomes due. The applicable limitations period for an obligation under a promissory note secured by a mortgage is five years under Section 95.11(2)(c). However, what Bollettieri now allows is the plaintiff to circumvent the statute of limitations by simply alleging the borrower was in a state of "continuing default", regardless of the date of the initial default.

Effectively, Bollettieri now negates the applicability of Section 95.11(2)(c) to mortgage foreclosures and Florida's long-standing case law that installments under an installment contract are each subject to their own statute of limitations. It does not matter whether the default was only 6 years ago, or 25 years ago, since all that a plaintiff must do to circumvent the statute of limitations is allege a continuing default. This is a clear judicial evisceration of the statute of limitations as applied to not only mortgage foreclosures, but installment contracts in general.

IV. DISMISSAL WITH PREJUDICE AND LEAVE TO FILE A SUBSEQUENT FORECLOSURE ACTION WITH A DIFFERENT DEFAULT DATE AND WITHIN THE LIMITATIONS PERIOD IS APPROPRIATE.

Despite the assertions of the Bank of New York, the appropriate remedy for a foreclosure action based on a default outside the limitations period under Section 95.11(2)(c) is dismissal with prejudice, but leave to file a third foreclosure action based on defaults within the limitations period. This question was already resolved in PNC Bank, N.A. v. Neal, 147 So.3d 32 (Fla. 1st DCA 2013). The Neal Court was specific when addressing the ability of the foreclosing lender to bring a subsequent foreclosure, stating "We affirm, but point out that the dismissal with prejudice of PNC Bank's foreclosure action against the Neals does not preclude PNC Bank from instituting a new foreclosure action based on a different act or a new date of default not alleged in the dismissed action."

This Court noted its intention to follow the holding in Neal in Bartram when it made clear that a subsequent foreclosure action had to be based on a different default than in the prior foreclosure action and that the statute of limitations could not have run on that particular default. Bartram at p. 23. Given that the default pled by the Bank of New York in its subsequent foreclosure action is outside of the five-year statute of limitations period in Section 95.11(2)(c), and has been admitted by the Bank of New York as the same default as pled in the first

foreclosure action, dismissal with prejudice by leave to file a subsequent foreclosure action is warranted.

CONCLUSION

As this Court made clear in Bartram, there is a fundamental public policy for having borrowers repay their financial obligations and honor the contracts they make when borrowing money. However, this legitimate public policy should not lay waste to the obligation of a plaintiff to plead a cause of action based on defaults that are not outside of the applicable limitations period. A plaintiff cannot simply allege a "continuing default" to maintain a cause of action that is clearly based on defaults that are outside of the applicable limitations period.

In the context of this case, the statute of limitations for installments under a promissory note secured by a mortgage is five years. Florida law has long recognized that installments due and owing under an installment contract mature when the installment is not paid on the date due. This means that the statute of limitations may run for some defaults, but not for others. If the Bank of New York wanted to maintain its foreclosure action against the borrower, then it was required to plead a default where the statute of limitations had not run on

that default.

For the foregoing reasons, the decision below in Bollettieri should be quashed and this Court should approve Hicks on the conflict issue.

Frazier & Brown Law, PLLC
Attorney for Petitioner
Bollettieri Resort Villas
Condominium Association, Inc.
202 South Rome Avenue, Suite 125
Tampa, Florida 33606
Email: shawn@frazierbrownlaw.com
Telephone: (813)603-8600

By: 

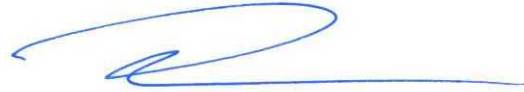
SHAWN G. BROWN, ESQ.
FBN 569135

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing *Petitioner's Initial Brief on the Merits* has been filed electronically with the Clerk of Court and to all parties this 7th day of March, 2017 to:

Nancy M. Wallace, Esq.
William P. Heller, Esq.
Ryan D. O'Connor, Esq.
Akerman LLP
nancy.wallace@akerman.com
william.heller@akerman.com
ryan.oconnor@akerman.com
Counsel for Appellee
The Bank of New York

Barry Graham
9270 Triana Terrace
Apartment 3
Ft. Myers, FL 33912



SHAWN G. BROWN, ESQ.
FBN 569135

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.



SHAWN G. BROWN, ESQ.