IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1671

VINCENT CRAVERO, et al.,

Petitioners/Defendants,

v.

LLP MORTGAGE LTD., f/k/a LOAN PARTICIPANT PARTNERS, LTD., a TEXAS LIMITED PARTNERSHIP,

Respondent/Plaintiff.

BY DISCRETIONARY JURISDICTION FROM
THE FOURTH DISTRICT COURT OF APPEAL
Lower Tribunal Case No. 4D02-2443

REPLY BRIEF OF PETITIONERS

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SUMMARY OF ARGUMENT

LPP's argument that the enactment of 28 U.S.C. § 2415 in 1966 ended the distinction between a public purpose and a private purpose, despite the host of more recent cases to the contrary, and that it also created an unlimited statute of limitations, violates the plain terms of the Statute. LPP's argument that an assignee has all the rights of its assignor completely ignores the lack of authorities extending the sovereign's immunities to an assignee. LPP's argument that *Florida Statutes* § 701.01 confers the federal government's sovereign immunity on a private assignee violates fundamental principles of federalism and is made without a single supporting authority. LPP's argument of non-acceleration of the Mortgages is undermined by the very terms of the Mortgages. Finally, LPP's argument that laches was never pleaded is incorrect.

ARGUMENT

I. FEDERAL STATUTE OF LIMITATIONS AND SOVEREIGN IMMUNITY

LPP asserts that 28 U.S.C. § 2415 is "the statute which dictates the statute of limitations applicable to actions by the government." Ans. Brf. at 7.[1] This, of course,

[1]Petitioners shall refer to Petitioners' Initial Brief as "Ini. Brf." and to Respondent's Answer Brief as "Ans. Brf." Unless otherwise specified, references to the Record shall be to the Index of Volume on Appeal provided by the Clerk of the Circuit Court of the Seventeenth District to the Clerk of the Fourth District Court of Appeal. References to the Record shall be designated by "R," followed by the volume and the page number.

is not true with regard to actions regarding real property mortgage foreclosures, which are expressly excluded under the terms of subsection (c) of the Statute. *See* Ini. Brf. at 31. Even LPP admits that, in the Eleventh Circuit Court of Appeals, there is no statute of limitations for a foreclosure. Ans. Brf. at 8 n. 2, citing the controlling Eleventh Circuit case of *U.S. v. Alvarado*, 5 F.3d 1425 (11th Cir. 1993).

LPP's assertion that the enactment of Section 2415 in 1966 ended the distinction between a public purpose and a private purpose (Ans. Brf. at 14) is undermined by the numerous cases after 1966 that have continued to make this distinction. *See* Ini. Brf. at 7-10 and the numerous recent cases cited there. LPP's public policy argument in its Brief at 35-36 in favor of extending an unlimited statute of limitations to private assignees is refuted by Congress's own assertion that even loans held by the government should have a limited period of limitations. Ini. Brf. at 23-24.

LPP's argument at page 31 of the Answer Brief that 28 U.S.C. § 2415's silence regarding assignment of the government's rights requires the Court to look to Florida's law regarding assignments, not the law regarding statutes of limitation, misses the point. Section 2415(c) explicitly states that the Statute does not provide for a limitations period for mortgages; assignment of the Mortgages by the Small Business Administration ("SBA") did not create one. Furthermore, assigning the Mortgages

does not transfer the sovereign's immunity to the statute of limitations. Ini. Brf. 7-9.

Curiously, LPP questions even the relevance of sovereign immunity to the Court's inquiry. Ans. Brf. at 8. Considering that the Fourth District's decision hinged on the issue of sovereign immunity, *LLP Mortgage Ltd. v. Cravero*, 851 So.2d 897 (Fla. 4th DCA 2003), LPP's question is unfathomable. Without sovereign immunity, because of the explicit absence of a mortgage limitations period in Section 2415, the state statute of limitations would have resolved this case in favor of the Craveros without the need for this Court's attention.

II. EXCEPTIONS TO THE "RIGHTS" OF AN ASSIGNEE

LPP cites the decision below several times for the "universally followed" proposition that "an assignee stands in the shoes of the assignor." *See, e.g.*, Ans. Brf. at 10, 11. However, the Fourth District wrote that the proposition is "rather universally followed," indicating that the Fourth District was aware that exceptions existed. (Emphasis added.) LPP's misquote overstates the Fourth District's certainty, and it overstates LPP's argument. The question before this Court is not the general proposition; the question is the breadth of the exceptions, and LPP's misquote glosses over the existence of exceptions that even the Fourth District tacitly acknowledged exist.

A. Assertion of sovereign immunity by a private assignee. The Craveros could not find any cases, and LPP cites to no cases, explicitly addressing the question

of the use by a private assignee of the sovereign immunity of the assignor as an avoidance to the affirmative defense of statute of limitations. This appears to be a question of first impression in Florida.

In order to bolster this "unlimited transferral" argument, LPP provides a list of cases that assert, in one way or another, that a transferor transfers to its transferee all the interest and rights of the transferor. Ans. Brf. at 10-11. None of this is at issue. LPP came into ownership of the SBA Notes, Guarantees, and Mortgages and thereby received whatever rights they provided, including the property rights afforded by law for such documents. LPP even had the right to sue the company that was the maker of the Notes and the Craveros, as the owner of the collateral of the Guarantees.

The issue is whether, when the Craveros properly asserted the affirmative defense of the statute of limitations, LPP had the right to assert sovereign immunity as an avoidance to the Craveros' affirmative defense. Fla. R. Civ. P. Rule 1.100(a). Sovereign immunity is not a right printed in the Mortgages, nor is it a right codified under either Florida or federal law. It is a right inherent in the sovereign, and none of the cases cited by LPP held or even implied that an avoidance based on sovereign immunity was transferred with a contractual document. Accordingly, the cases discussing assignment of the assignor's rights are both inapposite on their facts and irrelevant in their holdings on the issue before this Court.

The issue is not "rights" or "interests," it is "immunities." These cases do not address that issue.

The case of *United States v. Thornburg*, 82 F.3d 886 (9th Cir. 1996), is once again instructive. In *Thornburg*, the Ninth Circuit permitted the SBA to claim the benefit of the longer, federal, six year statute of limitations on money actions, rather than the shorter state limitations period, under circumstances in which the SBA assigned a loan to a bank solely for SBA collection purposes and then received the loan back, after which the SBA filed suit. The Court held that the state statute of limitations did not cause the right to enforce the note to expire while it was being held on behalf of the United States by the bank. *Thornburg* at 891-92. The Ninth Circuit distinguished this situation from one in which the government sold the note to the bank for its private collection purposes. *Id.* at 892-93.

If LPP is correct, and the assignee of a SBA loan succeeds to the immunities (for statute of limitations purposes) of the federal government, then the Ninth Circuit in *Thornburg* would not have had to go through the rather exhaustive exercise of concerning itself with which of the entities (SBA or the bank) held the loan from time to time. It would simply have noted that the loan was a federal government loan and ruled, without further analysis, that the state statute of limitations could never, ever apply. Instead, the Ninth Circuit analyzed the purpose of the assignment before

reinforcing that it is the United States as a sovereign that is not subject to state statutes of limitations unless it chooses to be subject.

In seeking to distinguish *Wamco, III LTD v. First Piedmont Mortgage Group*, 856 F.Supp. 1076 (E.D. Va. 1994) {"[U]nless a contrary intention is manifested or inferable, an assignment ordinarily carries with it all rights, remedies and benefits which are incidental to the thing assigned, "*except those which are personal to the assignor and for his benefit only*," 6A C.J.S. Assignments § 76 (emphasis added)}, LPP cites a Washington state appellate decision that, finding no other authority, cited a Texas decision for the proposition that "personal rights" incapable of assignment are those which constitute "accrued causes of action that may be asserted independently of ownership of the property." Ans. Brf. at 16-17, citing *Federal Financial Company v. Gerard*, 949 P.2d 412, 416 (Wash. App. 1998). LPP then attempts to analogize this ruling to the instant circumstances by stating that the statute of limitations is not a personal right because it "confers no personal benefit independent of the mortgages to which it is applied." Ans. Brf. at 17.

LPP misses the point. Of course the statute of limitations is not a "personal right," but it is not the "right" at issue in this case. At issue in this case is the transferability of an "immunity," which is the government's sovereign immunity, to an entity acting for its own private benefit and not for the benefit of the sovereign or the public.

LPP's appeal to Florida views of "personal" rights at 17-18 of the Answer Brief is also misplaced, as the rights to which LPP refers are consistently rights associated with the primary property right (which, in our case, would be the Mortgages), rather than rights to an avoidance of an affirmative defense (here, the right to assert sovereign immunity to the defense of statute of limitations).

B. LPP's improper reliance on *Florida Statutes* § 701.01. LPP repeatedly cites to Section 701.01 of the *Florida Statutes*[2] as a basis for its assertion that an assignee stands in the shoes of his assignor. Ans. Brf. at 9, 11, 40. LPP even asserts that an assignee's rights are "identical to the rights held by the assignor." Ans. Brf. at 40. Where does it obtain this language? The Statute does not use that language. LPP cites to no cases. In fact, the rights are not identical. Numerous cases hold that a statute of limitations applies to a private assignee, despite the fact that it did not apply to its governmental assignor. Ini. Brf. at 7-13.

The entire argument proposed by LPP regarding Section 701.01, which it has

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[2] **701.01 Assignment.**--Any mortgagee may assign and transfer any mortgage made to her or him, and the person to whom any mortgage may be assigned or transferred may also assign and transfer it, and that person or her or his assigns or subsequent assignees may lawfully have, take and pursue the same means and remedies which the mortgagee may lawfully have, take or pursue for the foreclosure of a mortgage and for the recovery of the money secured thereby.

never previously raised,[3] misses the point. The argument that a state, for all of its authority over property rights, can through legislation confer on a transferee of the federal government the federal government's sovereign immunity, violates fundamental principles of federalism. LPP cites to no legal authority conferring or confirming such broad authority to the states. Moreover, as previously clarified by the Craveros, the Congressional Record quite clearly demonstrates that it was not Congress's intention to confer such immunity on transferees, but to limit even the government's period to bring such actions. Ini. Brf. at 24.

III. JURISDICTION

LPP makes a rather lengthy attempt to have this Court re-visit the question of whether it should have accepted this case for review. Ans. Brf. at 6-13. However, in doing so, LPP concedes that one of the conflict cases, *Lovey v. Escambia County*, 141 So.2d 761 (Fla. 1st DCA 1962), involved a claim for adverse possession of property formerly owned by the federal government, even while maintaining that 28 U.S.C. § 2415 is not at issue. As discussed in the Initial Brief, the Congressional Record confirms that 28 U.S.C. § 2415(c) was enacted specifically for the purpose

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[3]LPP did not make this argument before the trial court and did not otherwise preserve it. Issues not raised in the trial court are not reviewable. *Natural Solutions Corporation v. Torrabind International, Inc.*, 840 So.2d 387 (Fla. 4th DCA 2003); *Dudash v. State*, 787 So.2d 105 (Fla. 2d DCA 2001).

of providing a defense to claims of adverse possession. Ini. Brf. at 32-33. The question of a private assignee's (Lovey's) right to assert sovereign immunity is clearly raised.

IV. "ACCELERATION" OF THE MORTGAGES

LPP makes the argument that only the Notes were accelerated, not the Mortgages. This misses the point, as the Mortgages were collateral for the Guarantees, not the Notes. There has never been a question that the Guarantees were accelerated, which is why LPP did not and could not include a claim to enforce them in this suit.[4,5]

LPP takes an odd tack in its argument, advanced for the first time, that the letter from SBA to Vincent Cravero regarding his Guaranty was not an acceleration letter, although advancing no other explanation for the letter. Ans. Brf. at 20-21. LPP then continues to discuss the relationship between the Notes and Mortgages, despite the fact that, if the Guarantees are accelerated and the statute of limitations has run, there

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[4]"The Note . . ., which was guaranteed by you, is in default. . . . The Small Business Administration . . . hereby accelerates the maturity of the Note and demands immediate payment of all sums due." Letter dated January 15, 1995, from U. S. Small Business Administration to Vincent P. Cravero. R1:160.

[5]LPP admitted that it does not have possession of the originals or copies of two of the Guarantees, and it only has copies of the others. Defendants' Amended Motion for Summary Judgment at 3.

is nothing left for the Mortgages to collateralize, because they do not collateralize the Notes.

If LPP's argument were generally to be true, then, when a lender accelerates a note, it can sue on the guaranty for the full sum due on the note solely because the guaranty is deemed accelerated at the filing of the suit. However, filing the suit seeking foreclosure would not accelerate the mortgage collateral, at least not without an explicit statement saying so, resulting in the proceeds of the foreclosed collateral only being paid to the holder up to the amount of the unaccelerated portion of the indebtedness. Under LPP's interpretation of the law, the remainder would have to be returned to the guarantor.

LPP's argument presupposes that there can be different amounts due under different documents despite the language in the documents tying them together. This misconceives the nature and purpose of the documents. A note is merely evidence of a "promise of signer to pay" an indebtedness. *Black's Law Dictionary* 1060 (6th ed. 1990) ("*Black's*"). A guaranty is written evidence of "a collateral agreement for performance of another's undertaking," according to the terms of the guaranty. *Black's* 705. A mortgage that collateralizes a guaranty is "an estate . . . intended to secure the performance of some act." *Black's* 1009.

The mortgage is an estate, not a debt instrument, so there can be no concept of

acceleration separate and apart from the instrument that the mortgage collateralizes. Accordingly, lenders do not generally and routinely write acceleration letters to each of (i) the makers of a note, (ii) the holder of each item of the lender's collateral for the note, (iii) the guarantors, and (iv) the holders of each item of the guarantors' collateral. Generally, acceleration letters are provided to the makers and, on occasion, the guarantors. The collateral holders have no say in the matter; each item of the collateral follows the instrument that it collateralizes.

Furthermore, because the Craveros' loan documents incorporate or otherwise recognize the terms of the other loan documents, the loan documents must be read in *pari materia.* Ini. Brf. at 18. In this case, the documents specifically and explicitly addressed each other, and it is impossible to read them any other way.

LPP does not agree that the Mortgages can secure the Guarantees while specifying that they are accelerated with the Notes. Ans. Brf. at 23. However, that is explicitly what they do, as drafted by LPP's predecessor in interest. Ini. Brf. at 17.

LPP expresses that it has the right to pursue mortgage foreclosure, even if the notes are time-barred. This is a correct statement of the law with regard to the borrower, which has received the benefit of the loan from LPP or its predecessor. However, it is not undisputed that this is the law with regard to a guarantor, who may have received a benefit from the borrower, but has not received one from the lender.

The lender's rights against the guarantor are specified only in the guaranty, and both the Statute of Frauds and case law prohibit imposition of any other rights against the guarantor. *Fla. Stat.* § 725.01; *See also* Ini. Brf. at 41-42.

Accordingly, LPP misconceives its options. Prior to the completion of the period of limitations, LPP could maintain a suit (i) on the Notes, (ii) on collateral of the Notes (if there were any), and (iii) on the Guarantees. If it were successful on the suit on the Guarantees, it could then enforce its judgment on the Guarantees by foreclosing on any collateral of the Guarantees. By convention, and sometimes by contract, suit on the Guarantees and suit to foreclose the collateral of the Guarantees are permitted to be maintained as separate counts of the same suit. However, this does not obviate the principal that, before the holder can obtain the collateral of the Guarantees, it must prevail on its claim under the Guarantees. LPP did not and cannot prevail under the Guarantees, because the Guarantees are time-barred.[6]

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[6]LPP's tacit assertion that the acceleration letter sent to the Craveros was not an acceleration of the Mortgages, presumably being only an acceleration of the Guarantees, fails for two reasons. First, this case was decided on summary judgment on the agreement that the Guarantees had been accelerated, R1:144-160, and LPP cannot raise at this time that it wants a different rendition of the facts than that to which it adhered before the trial court and on appeal to the Fourth District. Second, although this was not the case, even if the interest of only one of the two Craveros was accelerated, the foreclosure must fail, because the property is homestead property, R1:82, and a foreclosure may not be maintained against only one of the two spouses. *Pitts v. Pastore*, 561 So.2d 297 (Fla. 2d 1990); *Heath v. First National Bank in Milton*, 213 So.2d 883 (Fla. 1st DCA 1968).

The cases recognize that acceleration of the debt instrument containing an optional acceleration clause commences the period of limitations for foreclosure of a mortgage collateralizing the debt instrument. *Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995); *Monte v. Tipton*, 612 So.2d 714, 716 (Fla. 2d DCA 1993).

LPP asserts that *Smith v. FDIC, supra*, which corroborates the Craveros' position that acceleration of a debt instrument constitutes acceleration of the mortgage collateralizing such instrument, was decided in error because of its reliance on cases discussing acceleration of a mortgage, rather than acceleration of the note. Ans. Brf. at 26-27. However, *Smith* is only decided erroneously if LPP's position, that the mortgage acceleration must be separate from the debt instrument acceleration, is adopted. The Craveros' position, that acceleration of the debt instrument constituted "acceleration" of the mortgage, is completely consistent with *Smith*.

LPP raises the issue of when the debt instruments and the mortgage have distinct, inconsistent, acceleration clauses. Ans. Brf. at 23-31. Those situations are inapposite, as the Notes, the Guarantees, and the Mortgages in the instant case all provide for optional acceleration, R1:1-24; 122-25; the Mortgages state that they are accelerated with the Notes; and the Notes were accelerated. Ini. Brf. at 2, 17. There is no inconsistency.

LPP's argument that it can foreclose the Mortgages, even if suit on the Notes

is time-barred, made at pages 43-46 of the Answer Brief without supporting legal authority, is predicated on three faulty, unsupported premises. First, LPP hinges its argument on the mistaken statement that the Guarantees guaranty payment of the indebtedness, rather than the Notes, then quote the actual language of the Guarantees that confirms, as stated by the Craveros, that each of the Guarantees guaranties the sums payable "with respect to the note of the debtor." Second, LPP proposes that its argument is bolstered because the Mortgages are "one-step removed" from the time-barred Notes. Ans. Brf. at 44-45. In so saying, LPP discusses the "unconditional" nature of the Guarantees as if they remained actionable and completely ignores that the Guarantees are also time-barred, Ini. Brf. at 13-14, which is exactly the reason that the collateral of the Guarantees is inactionable. Third, without any record evidence of the relationship between the maker and these Defendants, and apparently for the sole purpose of bringing obloquy on the Craveros, LPP states at that "the Craveros through their business borrowed thousands of dollars." Ans. Brf. at 46.

V. LACHES

LPP's assertion at Page 47 of the Answer Brief that the Craveros did not adequately plead laches is simply false. Laches was pleaded in the Second Amended Answer at pages 4-5. R1:80-81. Laches was also asserted in Defendants' Amended Motion for Summary Judgment at pages 4 and 8. R1:147, 151.

VI. PEJORATIVE TERMINOLOGY

LPP asserts that, if the Court finds for the Craveros, the Craveros receive a windfall. Ans. Brf. at 6. This is wrong and completely unsupported in the record. The Craveros couldn't receive a windfall, as they were not the recipients of the loan proceeds.

LPP asserts at page 18 of the Answer Brief that "Defendants apparently believe that they will be prejudiced if the Plaintiff receives the benefit of its bargain." First, Defendants' belief is irrelevant to this appeal from an order granting summary judgment. Second, there is nothing in the record to suggest how or what Defendants believe. Third, there is nothing in the record to suggest what "bargain" LPP made in order to obtain the Notes, Mortgages, and Guarantees. Finally, LPP's use of the term "prejudiced" carries with it an unjustified pejorative implication.

CONCLUSION

For all the foregoing reasons, this Court should reverse the decision of the Fourth District and remand the case with instructions to reinstate the decision of the trial court granting the Craveros' Amended Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Anne S. Mason, Esquire, Mason Law, 17757 U.S. 19 N., Suite 500, Clearwater, Florida 33764, this _____ day of _____, 20____.

_____

E. SCOTT GOLDEN, ESQUIRE

CERTIFICATE OF COMPLIANCE WITH RULE 9.210(A)(2)

I HEREBY CERTIFY that the font size used in this Brief is Times New Roman 14 point in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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E. SCOTT GOLDEN, ESQUIRE

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