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IN THE SUPREME COURT OF FLORIDA

Case No.: SC14-1265
(Consolidated with Case Nos.
SC14-1266 and SC14-1267)

L.T. Case No.: 5D12-3823

LEWIS BROOKE BARTRAM,
THE PLANTATION AT PONTE
VEDRA, INC., and PATRICIA J. BARTRAM

Petitioners,

v.

U.S. BANK NATIONAL ASSOCIATION,

Respondent.

_____/

BRIEF OF PETITIONER THE PLANTATION AT PONTE VEDRA, INC.

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I.
STATEMENT OF THE CASE AND FACTS

This Appeal addresses the timeliness of a Mortgage foreclosure action (or of some equivalent assertion of rights under a Mortgage) brought more than five years after the Mortgagee had accelerated the loan, thus making the entire balance due and payable, when it filed an action to foreclose the Mortgage that was dismissed without prejudice.[1] The Fifth District Court of Appeal held that the second action was not time-barred because the dismissal of the earlier action, even without prejudice, and even without any other form of communication to the Mortgagor, had in itself served to retract the prior acceleration, giving the Mortgagee the right to sue for any asserted breaches of the Mortgage Agreement occurring within the previous five years. *U.S. Bank National Ass'n v. Bartram*, 140 So. 3d 1007 (Fla. 5th DCA), *review granted*, 2014 WL 4662078 (Fla. Sept. 11, 2014).

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[1]Under § 95.11(2)(b), Fla. Stat., the statute of limitations for filing a lawsuit to collect on a written mortgage indebtedness is five years. "Ordinarily, the statute of limitations under an installment contract starts to run on the date each payment becomes due." *Greene v. Bursey*, 733 So. 2d 1111, 1114 (Fla. 4th DCA 1999), *citing Isaacs v. Deutsch*, 80 So. 2d 657, 660 (Fla. 1955). However, when the Mortgagee exercises a contractual right to accelerate, the five-year statute of limitations starts at the time it does so. *See Spencer v. EMC Mortgage Corp.*, 97 So. 3d 257, 262 (Fla. 3d DCA 2012); *Cadle Co. v. Rhoades*, 978 So. 2d 833, 834 (Fla. 3d DCA 2008); *Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993). *See also Smith v. F.D.I.C.*, 61 F.3d 1552, 1561 (11th Cir. 1995) (Fla. law).

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The District Court relied upon *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004), which had addressed the issue of res judicata--not the statute of limitations--specifically, the res judicata effect of a prior unsuccessful foreclosure action in which the Mortgagee also had accelerated, which had been dismissed *with* prejudice. This Court held that in such circumstances, the doctrine of res judicata did not bar a subsequent action for acceleration and foreclosure.

A. The 2006 Foreclosure Action. Petitioner Lewis Bartram ("Bartram") is the Mortgagor, having acquired the property from his former wife, Petitioner Patricia J. Bartram ("Patricia"), in a dissolution proceeding (*see* R. 342, 388-89). Bartram had then delivered a Second Mortgage and Mortgage Note on the property to Patricia (R. 6-8), which established her interest. Through a series of transactions, Respondent U.S. Bank ended up with the First Mortgage (*see* R. 475-500, 609-10).

On May 16, 2006, U.S. Bank sued Bartram for foreclosure, equitable subordination of the Mortgage, and liability on the Note and Mortgage (the "2006 Foreclosure Action") (R. 469-504). The Complaint also named Petitioner The Plantation at Ponte Vedra, Inc. (hereinafter "Plantation"), the Homeowners' Association, which has a lien for unpaid assessments (R. 469). The Complaint invoked U.S. Bank's right of acceleration. It pleaded that Bartram had defaulted "under the terms of the note and mortgage for the January 1, 2006 payment and all

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payments due thereafter" (R. 470, ¶ 7); that "[a]ll conditions precedent to the acceleration of this Mortgage Note and of foreclosure of the Mortgage have been fulfilled or have occurred" (*id.*, ¶ 8); that the Mortgage Note permitted U.S. Bank to accelerate the balance due on the Note following pre-suit notice; and also permitted the Borrower to reinstate the Mortgage Note following acceleration (R. 488, ¶ 12). It is not disputed that Bartram never did so. U.S. Bank subsequently filed two Motions for Summary Judgment, with Affidavits stating that the accelerated balance of the Mortgage Note was due (*see* R. 613-15, 622-25, 633-35).

As the District Court noted, 140 So. 3d at 1009, Bartram at no time denied that he had defaulted on the Note; that U.S. Bank had satisfied all conditions precedent to acceleration, which included providing pre-suit notice of acceleration (*see* R. 261, ¶22); or that U.S. Bank had properly accelerated the Mortgage Note. His only defenses were that U.S. Bank had not filed the original Note and Mortgage with its Complaint, and that there was a question as to the priority of the liens of U.S. Bank and Patricia Bartram. *See* Plantation's District Court Answer Brief, App. 2.

In March of 2011, while the 2006 Foreclosure Action was still pending, Patricia filed an action against U.S. Bank, Plantation, and Bartram contending that her Second Mortgage was "superior in dignity" to any other Mortgage or lien on the property (R. 2) ("the Second Action").

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Subsequently, the Court in the 2006 Foreclosure Action scheduled a case management conference for May 4, 2011 (R. 434). The Notice said that the failure of the parties and their attorneys to appear in person could result in the case being dismissed without prejudice (*id.*). When U.S. Bank's attorney failed to appear at the hearing, on May 5 the trial court entered an Order of Dismissal without prejudice (R. 434-35). In dismissing, the Court said that "this case is approximately five years old and four years beyond time standards" (R. 433), but it still dismissed without prejudice. This was 11 days short of five years after U.S. Bank had first accelerated the Mortgage Note. As we note below, under Florida law, a dismissal without prejudice has no res judicata effect, wholly apart from *Singleton*'s application.

U.S. Bank did not appeal the Order of Dismissal. Nor did U.S. Bank re-file the action. Nor did U.S. Bank ever file a new foreclosure action.

Almost three months after the Dismissal, on July 29, 2011, Bartram filed in the 2006 Foreclosure Action a Motion to Cancel Promissory Note and Release Lien of Mortgage (R. 646-48). However, the trial court ruled that its prior Order of Dismissal had become final, and that it had no jurisdiction to entertain the Motion (R. 442).

B. The Second Action. U.S. Bank did not bring a second action to foreclose the Mortgage Note. Instead, it was Bartram who, on April 26, 2012, a year after the 2006 Foreclosure Action had been dismissed, and almost six years after U.S. Bank

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had accelerated, filed a Cross-Claim against U.S. Bank in the Second Action that had been brought by Patricia, for a declaratory judgment quieting title to the property, on the ground that any claim that U.S. Bank might make would be time-barred, because it would be asserted more than five years after U.S. Bank had accelerated the Loan (R. 168-72).[2] U.S. Bank answered on June 27, 2011, over six years after it had first accelerated, asserting the superiority of its lien (R. 47-51).

Bartram argued in a subsequent Motion for Summary Judgment that the 2006 Foreclosure Action, in which U.S. Bank had accelerated the Mortgage Note, had not tolled the five-year statute of limitations (*see supra* note 1); that more than five years had elapsed since U.S. Bank had accelerated the balance of the entire Mortgage; and that any attempt to assert a claim of default, with or without a second attempt to accelerate, would be time-barred (*see* 291-92). U.S. Bank cited *Singleton* in opposing the Motion (*see* R. 347). Eventually the Circuit Court entered Final Summary Judgment in Bartram's favor against U.S. Bank, quieting title to the property and

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[2]Under Florida law, the pendency of the 2006 Foreclosure Action did not toll the statute of limitations. *See McBride v. Pratt & Whitney*, 909 So. 2d 386, 388 (Fla. 1st DCA 2005). Only those events listed in §95.051(2), Fla. Stat., toll the statute of limitations. *See Larson & Larson P.A. v. TSE Industries, Inc.*, 22 So. 3d 36, 46 (Fla. 2009); *Davis v. Monahan*, 832 So. 2d 708, 711 (Fla. 2002); *Hearndon v. Graham*, 767 So. 2d 1179, 1185 (Fla. 2000); *Tortura & Co., Inc. v. Williams*, 754 So. 2d 671, 673 (Fla. 2000); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *HCA Health Services of Florida, Inc. v. Hillman*, 906 So. 2d 1094, 1098 (Fla. 2d DCA 2004), *review denied*, 904 So. 2d 430 (Fla. 2005). A prior action is not one of them.

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canceling the U.S. Bank Mortgage Note (R. 443). Upon the denial of rehearing (R. 524), U.S. Bank appealed (R. 584-89).

C. The District Court's Decision. The District Court reversed. It began "by noting that there is no question of the Bank's successful acceleration of the entire indebtedness on May 15, 2006." 140 So. 3d at 1009. It also noted U.S. Bank's "conten[tion] that the dismissal of its foreclosure suit nullified its acceleration of future payments; accordingly, the cause of action on the accelerated payments did not accrue and the statute of limitations did not begin to run on those payments, at least until default occurred on each installment" (*id.* at 1009-10). In contrast, "[t]he HOA [Plantation] and Bartram . . . assert that the cause of action for default of future installment payments accrued upon acceleration, thus triggering the statute of limitations clock to run, and because the Bank did not revoke its acceleration at any time after the dismissal, the five-year statute of limitations period eventually expired, barring the Bank from bringing another suit." *Id.* at 1010.

The District Court turned to *Singleton*, which had dealt with the issue of a res judicata, not the statute of limitations, holding that the dismissal *with* prejudice of a Mortgage foreclosure action, in which the Mortgagee had accelerated, did not bar on res judicata grounds the Mortgagee's subsequent action to foreclose on the same Mortgage. Even though the Circuit Court's dismissal in *Bartram* was without

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prejudice, and therefore had no res judicata effect in the first place, the District Court in *Bartram* held that the reasoning of *Singleton* nevertheless applied to the statute-of-limitations defense, 140 So. 3d at 1013-14:

> The court in *Singleton* reasoned that a subsequent, separate default creates a new and independent right to accelerate payment in a second foreclosure action even where the lender triggered acceleration of the debt in a prior, unsuccessful action that had been dismissed with prejudice. The court was clear that, regardless of the fact that acceleration was invoked in the first suit, the doctrine of res judicata does not necessarily bar subsequent foreclosure actions where the subsequent suit alleged defaults other than those sued for in the first suit, because 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." *Singleton*, 882 So. 2d at 1008. If a "new and independent right to accelerate" exists in a res judicata analysis, there is no reason it would not exist vis-a-vis a statute of limitations issue. A "new and independent right to accelerate" would have to mean that the new defaults presented new causes of action, regardless of the fact their due dates had been accelerated in the prior suit.
>
> Based on *Singleton*, a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration has been triggered and the first case was dismissed on the merits. Therefore, we conclude that a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes, provided the subsequent foreclosure action on the

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> subsequent defaults is brought within the limitations period.

The District Court also held, *id.* at 104, that "[b]ecause we believe the issue we resolved is a matter of great public importance, we certify the following question to the Florida Supreme Court":

> Does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payment defaults occurring subsequent to dismissal of the first foreclosure suit?

This Court accepted jurisdiction in an Order dated September 11, 2014.

II.
ISSUE ON APPEAL

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT U.S. BANK'S ASSERTION OF RIGHTS IN THE PROPERTY WAS NOT TIME-BARRED.

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III.
STANDARD OF REVIEW

"Where there is no genuine issue of fact, this Court's review of a Summary Judgment is *de novo*." *Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013). *Accord, Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Likewise, when the underlying facts are not disputed, the applicability of a statute of limitations presents a *de novo* issue of law. *See Raymond James Financial Services, Inc. v. Philips*, 126 So. 3d 186, 190 (Fla. 2013); *Medical Data Systems, Inc. v. Coastal Ins. Group, Inc.*, 139 So. 3d 394, 396 (Fla. 4th DCA 2014).

IV.
SUMMARY OF ARGUMENT

Singleton abrogates the doctrine of res judicata in a certain category of mortgage-foreclosure cases, holding that in such cases, for purposes of res judicata, a prior acceleration resulting in an unsuccessful foreclosure action was a nullity, such that "the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations." 882 So. 2d at 1007. *Singleton* did not address the effect of the five-year statute of limitations in such cases. Indeed, in *Singleton* the statute of limitations had not yet run at the time the second action was filed. Nor does *Singleton* say anything inconsistent with the conclusion that even in those cases in which a prior action and acceleration will not bar a second action

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under the doctrine of res judicata, the second action still has to be timely filed. In the instant case, as the District Court said, the Bank's acceleration was "successful." 140 So. 3d at 1009. The policies and equities underlying a statute of limitations are different from those underlying the doctrine of res judicata. And respectfully, the effect of a "successful" acceleration upon the statute of limitations is the province of our Legislature--not the courts. For this and other reasons, the *Singleton* decision, and its rationale, do not apply to the statute of limitations, and the Bank's assertion of rights in the property was untimely.

Moreover, even if *Singleton* could be read to "restart" the statute of limitations in all cases to which it applies, this is not one of those cases. As noted, *Singleton* made clear more than once that its holding was limited--that in some cases, an adverse disposition of the first action for foreclosure will continue to bar the second action under the doctrine of res judicata. It said that "the doctrine of res judicata does not *necessarily* bar successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit." *Id.* at 1008 (emphasis added). The controlling question is how to define the acknowledged limits of this Court's decision in *Singleton*.

Even assuming *arguendo* that the rule announced in *Singleton* can be applied to a statute-of-limitations defense, there are four reasons why the rule announced in

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Singleton does not apply in the instant case. First, it is a tautology that *Singleton* applies only when the first lawsuit was dismissed with prejudice. A lawsuit dismissed without prejudice does not have res judicata effect in the first place, and therefore *Singleton* has no application in such a case. Not surprisingly, therefore, both in *Singleton* and in the hypotheticals posited in *Singleton,* the dismissal was with prejudice; the doctrine of res judicata otherwise would have applied; the Court spoke only of cases in which the first disposition was on the merits; and for the reasons stated, the Court held in *Singleton* that the defense of res judicata would not apply in such cases.

But the *Singleton* holding and rationale have no application when the first action was dismissed without prejudice. This not only is a tautology; it not only is consistent with the examples provided in *Singleton*; it also is consistent with both the Mortgagor's rights and the policies underlying application of a statute of limitations. A dismissal without prejudice leaves open the possibility that the action will be re-filed. It provides no cloture of the kind posited in *Singleton*; it leaves the Mortgagor at risk; and only application of the statute of limitations will provide repose from that risk. This may preclude an otherwise-meritorious foreclosure claim, but that is what a statute of limitations does. And there are salutory reasons for it doing so--indeed, reasons of constitutional dimension.

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Second, application of the rule in *Singleton*, which is grounded in principles of equity, depends upon the Mortgagee's prompt and unqualified communication to the Mortgagor that the Mortgagee considers the prior acceleration to be inoperative. In the instant case, at no time before asserting its position defensively in this action did U.S. Bank ever affirmatively disclaim its prior acceleration of the Mortgage Note. During all of this time, the prior acceleration remained unaffected; and Bartram was blind-sided by U.S. Bank's surprise claim to all payments that assertedly had not been made during the previous five years. As numerous decisions hold, at the very least, if the Mortgagee has a right to retract an acceleration, it has to clearly advise the Mortgagor that it is exercising that right.

Third, even if *Singleton* could apply to a dismissal without prejudice, and without any notice of deceleration to the Mortgagor, *Singleton* is grounded in the equities of the case. In the instant case the equitable considerations that motivated the Court in *Singleton* overwhelmingly favor the Mortgagor. Everything that happened in this case was the Mortgagee's fault. U.S. Bank failed to show up at a case management conference, in an action in which the Mortgagor had never denied that it had breached the Contract or that the acceleration was proper. Then U.S. Bank did not appeal the dismissal; and inexplicably, U.S. Bank did not even re-file the action. Nor did it ever file a new action. Instead, it waited until after five years, and

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even then asserted its position only defensively, in response to Bartram's Cross-claim. Its actions can only be described as gross dereliction. The *Singleton* holding is grounded in equitable considerations, and the equities in this case are one-sided.

Fourth, *Singleton* does not address the extent to which the parties can make their own agreement as to what happens when the Mortgagee announces an election--specifically, whether and how it might be retracted. Indeed, to the contrary, *Singleton* talks about the "equities" and the "ends of justice," 882 So. 2d at 1008, which counsel that the Mortgagee should be held to the terms of its own Contract.

Bartram had a constitutional right, under the U.S. and Florida Constitutions, to enforce the Mortgage Agreement. This right applies to Mortgage Agreements no less than any others. And here, both the Bank's right to accelerate and *Bartram*'s right to reinstate the Mortgage are defined in the Note. They give the Mortgagee the right to accelerate, and they give the *Mortgagor* the power to reinstate under certain circumstances. By the familiar doctrine of *expressio unius est exclusio alterius*, which applies to contracts as well as statutes, this language implies the parties' preclusion of a Mortgagee's power to retract an acceleration. Notwithstanding any options that might otherwise be afforded the parties, this Contract should prevail; and *Singleton* says nothing to the contrary.

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V.
ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT U.S. BANK'S ASSERTION OF RIGHTS IN THE PROPERTY WAS NOT TIME-BARRED.

A. Singleton. *Singleton* concerns application of the doctrine of res judicata to a Bank's second foreclosure action seeking acceleration of a Mortgage, notwithstanding that an earlier foreclosure action, also seeking acceleration, had been dismissed with prejudice for the Mortgagee's failure to appear at a case management conference. Under Rule 1.420(b), Fla. R. Civ. P., a dismissal with prejudice is considered to be "an adjudication on the merits," and has res judicata effect.[3]

Mortgagor Singleton had allegedly defaulted by failing to make payments due between September 1, 1999 and February 1, 2000. After the first action was

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[3] *See W & W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc.*, 35 So. 3d 79, 82 (Fla. 4th DCA 2010); *Chassan Professional Wall Covering, Inc. v. Victor Frankel, Inc.*, 608 So. 2d 91, 93 (Fla. 4th DCA 1992). *See also Dorta v. Wilmington Trust National Bank Ass'n*, 2014 WL 1152917, *6 n. 3 (S.D. Fla. March 24, 2014) (federal law); *Southern Coatings, Inc. v. City of Tamarac*, 916 So. 2d 19, 21 (Fla. 4th DCA 2005) (same); *Pettijohn v. Dade County*, 446 So. 2d 1143, 1145 (Fla. 3d DCA 1984) (same). A dismissal without prejudice does not have res judicata effect. *See Taylor v. State*, 65 So. 3d 531, 535 (Fla. 1st DCA 2011) (dismissal without prejudice "means that the action can be initiated again at some point in the future, provided that the statute of limitations has not expired"); *Froman v. Kirland*, 753 So. 2d 114, 116 (Fla. 4th DCA 1999), *review denied*, 766 So. 2d 221 (Fla. 2000); *Chassan Professional Wall Covering, supra, citing Makar v. Investors Real Estate Management, Inc.*, 553 So. 2d 298 (Fla. 1st DCA 1989).

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dismissed with prejudice, the Bank filed a second foreclosure action alleging the failure to make payments between April 1, 2000 and the time of the action. The second action was filed within the five-year statute of limitations triggered by the initial acceleration. Rejecting the defense of res judicata, the Circuit Court had entered a Summary Final Judgment of Foreclosure in the second lawsuit, and the Fourth District Court had affirmed, on the ground that "[t]he second action involved a new and different breach." *Singleton v. Greymar Associates*, 840 So. 2d 356, 356 (Fla. 4th DCA 2003).

This Court approved the District Court's decision, holding that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not *necessarily* barred by res judicata." 882 So. 2d at 1006-07 (emphasis added). The Court said nothing about a statute of limitations, nor was there any occasion to do so, given that the second action had been filed within five years of the initial acceleration.

Because the language used by the Court is critical, we will quote its holding verbatim below. We have added emphasis to illustrate that the Court did not announce a blanket rule excusing all attempts by a Mortgagee to avoid the res judicata consequences of its acceleration in a prior unsuccessful action--only that the

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outcome of the first action does not "necessarily" bar the second. *Id.* at 1007. The Court held, *id.* at 1007-08:

> While it is true that a foreclosure action and an acceleration of the balance based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue. . . . *For example*, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults. *In those instances*, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence an adjudication denying acceleration and foreclosure *under those circumstances* should not bar a subsequent action a year later if the mortgagor ignores her obligation on the mortgage and a valid default can be proven.
>
> This seeming variance from the traditional law of res judicata rests upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship. For example, we can envision many instances in which the application of [a different rule] would result in unjust enrichment or other inequitable results. If res judicata prevented a mortgagee from acting on a subsequent default *even after an earlier claimed default could not be established*, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note--merely because she prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.

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> We must also remember that foreclosure is an equitable remedy and there may be some tension between a court's authority to adjudicate the equities and the legal doctrine of res judicata. The ends of justice require that the doctrine of res judicata not be applied so strictly as to prevent mortgagees from being able to challenge defaults on a mortgage. . . . We can find no valid basis for barring mortgagees from challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a separate alleged default.
>
> We conclude that the doctrine of res judicata does not *necessarily* bar successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit. *In this case*, 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.

For present purposes, there are six things to emphasize about *Singleton*. First, *Singleton* did not involve the statute of limitations, but rather the principle of res judicata. Indeed, the facts stated in *Singleton* make clear that the statute of limitations had not yet run at the time the second action was filed. *Singleton* invokes and relies upon the equitable considerations that underlie a judge-made doctrine--res judicata. (*see infra* note 4)--whereas a statute of limitations is a creation of the Legislature, within the Legislature's prerogatives (*see infra* pp. 24-25). There is nothing in *Singleton* that is inconsistent with the conclusion that a mortgage-foreclosure claim that is not barred by the doctrine of res judicata is still subject to the statute of

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limitations triggered by the initial acceleration--here, an acceleration that the District Court said was "successful." 140 So. 3d at 1009. As we note below, there are different policies underlying the two doctrines, which are important in this context, and the statute of limitations is a legislative province.

Second, even if *Singleton*'s holding can be read to encompass the limitations defense, as noted, the Opinion makes clear that its holding is not universal; it does not apply to every attempt to re-file a foreclosure suit and reassert an acceleration after a prior suit based on a prior acceleration has been disposed of. The Court said that the second action "is not necessarily barred by res judicata"; it said that "[i]n this case the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment"; it provided "example[s]" of cases in which the Mortgagee might re-file after losing on the merits--for example, because the Mortgagor was not in default, or the Mortgagee had waived reliance on the asserted default; it said that the second action might proceed "[i]n those instances" and "under those circumstances"; and it repeated that the second action might be permissible where "an earlier claimed default could not be established."

Third, it is critical that the earlier action in *Singleton* had been dismissed with prejudice, which is an adjudication on the merits that would otherwise have res judicata effect (*see supra* note 3). That dismissal meant that the particular claim

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asserted, which was based upon payments assertedly due between September 1, 1999 and February 1, 2000, could not be brought again. On the other hand, a dismissal without prejudice does not have res judicata effect, and can be brought again (*see supra* note 3). As we suggest below, that is a controlling distinction.

Fourth, the *Singleton* Opinion does not disclose, nor does the District Court Opinion, whether, when, and in what form the Mortgagee might have advised the Mortgagor that it wanted to revoke the acceleration, and reserve the option to re-file for any future default, with the option to accelerate again.

Fifth, the *Singleton* holding is grounded in equitable considerations, which in proper cases may supersede application of the court-made doctrine of res judicata. Even if the *Singleton* rubric applied here, in the instant case these equitable considerations overwhelmingly favor the Mortgagor's position. U.S. Bank's dereliction in this case was profound, and its attempt at resurrection was highly prejudicial to Mr. Bartram.

Sixth, *Singleton* does not say anything about the extent to which the parties themselves can agree to what happens when the Mortgagee announces an acceleration--that is, whether and how it might be retracted. There is nothing in *Singleton* that implies abrogation of the parties' constitutional right to make their own agreement on the matter.

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B. Argument.

1. Even in Cases in Which Singleton Applies, Meaning That the Disposition of the First Foreclosure Action Does Not Prohibit the Second Action Under the Doctrine of Res Judicata, the Second Action Still Has to Be Timely Filed. In *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974), this Court upheld against constitutional challenge all but one of the provisions of the 1972 Florida No-Fault Statute (§§ 627.737, 627.738, Fla. Stat.). In the process, the Court approved the trial court's ruling that the Plaintiffs' personal-injury claim had not yet matured at the time they had filed the action, because they did not satisfy the Statute's $1,000 medical-expense threshold (§627.732(2)). *See* 296 So. 2d at 12. However, noting that by the time of its decision the Plaintiffs had "now exceeded the one thousand dollar 'threshold' requirement," this Court held that "[t]o allow the earlier dismissal of the complaint with prejudice to stand would have the effect of depriving the appellants of their rights under the statute by virtue of dismissal of an action that had not accrued as of the time of dismissal." *Id.* at 23. In "the interest of justice," the Court found "such a construction untenable and [held] that the plaintiff may sue for such damages once the 'threshold' has been crossed, *so long as it is within the statute of limitations.*" *Id.* (emphasis added). Thus, even as it declined on equitable grounds to enforce the otherwise-preclusive effect of the dismissal with prejudice, the Court

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nonetheless held that any newly-filed action would still have to be timely filed, as measured by the date when the Plaintiffs had first met the threshold dollar requirement.

Likewise in the instant case, any equities that might justify suspension of the principle of res judicata do not necessarily counsel that the otherwise-applicable statute of limitations should likewise be suspended. These are two different defenses; they are informed by different considerations; and indeed, they are the province of two different branches of government. In *Singleton*, this Court said only that "justice would not be served if the mortgagee was barred from challenging the subsequent default payment *solely* because he failed to prove the earlier alleged default." 882 So. 2d at 1007-08 (emphasis added).[4] But in the instant case, wholly apart from the equities that may inform a court's determination of whether an earlier adjudication precludes a subsequent claim, there are important policies supporting the Legislature's determination that "once a claim is extinguished by the statute of limitations, it cannot be revived . . . ." *Williams v. Jones*, 326 So. 2d 425, 429 (Fla. 1975), *appeal dismissed*, 429 U.S. 803 (1976). *See Allie v. Ionata*, 503 So. 2d 1237, 1241 (Fla. 1987). As the U.S. Supreme Court said in *Wood v. Carpenter*, 101 U.S.

[4]As *Lasky* makes clear, the res-judicata doctrine is informed by equitable considerations. *Accord*, *State v. McBride*, 848 So. 2d 287, 291 (Fla. 2003); *deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97, 98 (Fla. 1973).

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135, 139 (1879):

> Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

The purpose of a "statute of limitations is in providing repose for potential defendants and in avoiding stale claims." *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 487 (1988).[5] It protects against "tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075-76 (Fla. 2001). *See Tortura & Co., Inc. v. Williams*, 754 So. 2d 671, 681 (Fla. 2000). It actually creates "a constitutionally protected property right to be free from the claim . . . ." *In re Estate of Smith*, 685 So. 2d 1206, 1210 (Fla.), *cert. denied sub nom. Scruggs v. Wilson*, 520 U.S. 1265 (1997). *Accord, Wood v. Eli Lilly & Co.*, 701 So. 2d 344, 346 (Fla. 1997); *Wiley v. Roof*, 641 So. 2d 66, 68 (Fla. 1994). These considerations are

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[5]*See Mims v. Reid*, 98 So. 2d 498 (Fla. 1957) (this rationale reflects "the plainest and most substantial justice--namely, that litigation should have an end"); *Lanigan v. Lanigan*, 78 So. 2d 92, 96 (Fla. 1955); *De Huy v. Osborne*, 96 Fla. 435, 442, 118 So. 161, 163 (1928).

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certainly implicated in an action to foreclose a Mortgage Note, given the fact-based defenses that may be asserted in such an action, which require witnesses, documents, and accurate memories,[6] and given that a sense of repose is important to a homeowner.[7]

This outcome may preclude an otherwise permissible claim--for example, the action might not be barred by the doctrine of res judicata, and the asserted breach may be incontestible (in the instant case, Bartram never contended otherwise)--but that is what a statute of limitations does. Whether the case is worth $5 or $5 million--whether the underlying contract was to last for 20 days or 20 years--if it is not timely brought, it is extinguished. "[E]quity aids the vigilant and not the indolent." *Lanigan*

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[6]*See Quality Roof Services, Inc. v. Intervest National Bank*, 21 So. 3d 883, 885 (Fla. 4th DCA 2009) (unclean hands, unconscionability); *Cross v. Federal National Mortgage Ass'n*, 359 So. 2d 464, 465 (Fla. 4th DCA 1978) (overreaching); *Knight Energy Services, Inc. v. Amoco Oil Co.*, 660 So. 2d 786, 789 (Fla. 4th DCA 1995), *review denied*, 670 So. 2d 937 (Fla. 1996) (unclean hands, unconscionability); *Jones v. State ex rel. City of Winter Haven*, 870 So. 2d 52, 55-56 (Fla. 2d DCA 2003) (estoppel).

[7]*See* Bernhard at 36 ("[E]xtension of *Singleton* may ignore the purpose of the statute of limitations, which includes encouraging the alienability of real property, protecting [against] the unexpected enforcement of stale claims brought by plaintiffs who have slept on their rights and ensuring fairness by not allowing enforcement of unfresh claims . . .").

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v. Lanigan, 78 So. 2d 92, 96 (Fla. 1955).[8]

The instant case is a paradigm of this principle. Here the dismissal of the first action was entirely U.S. Bank's fault, when it ignored the trial court's warning and failed to show up at a case management conference. Then U.S. Bank did not appeal the dismissal, and inexplicably, U.S. Bank did not re-file the action. Nor did it ever file a new action. Instead, U.S. Bank waited until after five years to assert its position--and even then, it only did so defensively--not in support of any new attempt to foreclose. And its dereliction was particularly damning given that the Mortgagor did not, and could not, deny that he had breached the Contract.

As noted, it is precisely such conduct--indeed, less egregious conduct--that lies at the heart of a statute of limitations, and informs the Florida Legislature's promulgation of Chapter 95 of the Florida Statutes. As opposed to the doctrine of res judicata--a court-administered doctrine informed by equitable considerations (*see supra* note 4)--the statute of limitations is a legislative concern. As the Court said in *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001), "fixed

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[8]*See Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001) ("how resolutely unfair it would be to award one who has willfully or carelessly slept on his rights an opportunity to enforce an unfresh claim"); *Nardone v. Reynolds*, 333 So. 2d 25, 36 (Fla. 1976); *Nussey v. Caufield*, 146 So. 2d 779, 783 (Fla. 2d DCA 1962) ("[I]t is not the office of equity to shield a litigant from that which results from his own improvidence").

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limitations on actions are predicated on public policy and are the product of modern legislative, rather than judicial process." *See Kalway v. Singletary*, 708 So. 2d 267, 268 (Fla. 1998). Thus, in declining to import a delayed-discovery doctrine into the tolling provisions of §95.051(2) (*see supra* note 2), this Court has said that "[t]o hold otherwise would result in this Court rewriting the statute, and, in fact, obliterating the statute." *Davis v. Monahan*, 832 So. 2d 708, 711 (Fla. 2002). It said in *Hearndon v. Graham*, 767 So. 2d 1179, 1185 (Fla. 2000) that "[t]he tolling statute specifically precludes application of any tolling provision not specifically provided therein." *See Federal Ins. Co. v. Southwest Florida Retirement Center, Inc.*, 707 So. 2d 1119, 1122 (Fla. 1998). This Court in numerous contexts has declined to infringe upon legislative prerogatives.[9]

The current statutory scheme governing Mortgage foreclosure is the product of sweeping amendments to the Florida Statutes in 1974, reducing the limitations period on an action at law for breach of the Mortgage Note from 20 to five years; at the same time subjecting the equitable remedy of foreclosure to the same five-year

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[9]*See, e.g., Gomez v. Village of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010); *Velez v. Miami-Dade County Police Department*, 934 So. 2d 1162, 1164-65 (Fla. 2006); *Baker v. State*, 636 So. 2d 1341, 1343 (Fla. 1994); *Hancock v. Board of Public Instruction of Charlotte County*, 158 So. 2d 519, 522 (Fla. 1963). *See generally Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004), *cert. denied*, 543 U.S. 1121 (2005) (solicitude for separation of powers).

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limitation (thus eliminating the pre-existing dichotomy that even where recovery on the Mortgage Note was barred by the statute of limitations, a court sitting in equity could still provide the remedy of foreclosure); and prescribing the exclusive list of allowable bases for tolling the statute of limitations. As this Court has ruled, it has no power to alter these statutory provisions. Given the established principle that the statute of limitations starts to run at the time of acceleration, *see supra* note 1, the District Court's decision therefore violated the separation of powers in two ways: 1) there is no legislative provision for revoking or nullifying a statute of limitations once it starts; and 2) there is no legislative provision for tolling the statute during the pendency of a prior action (*see supra* note 2). (And only Bartram--not the Bank--had a contractual right to reinstate the Mortgage (*see infra*)).

Here, as the District Court noted, "there is no question of the Bank's successful acceleration of the entire indebtedness on May 15, 2006." 140 So. 3d at 1009. There is also no question that this successful acceleration started the five-year statute of limitations, as the Legislature provided. There is also no provision of the Florida Statutes that could either undo or suspend the statute of limitations. All of the policies underlying a statute of limitations are illustrated by the Bank's dereliction in this case. And nothing in *Singleton* suggests that even where equitable considerations might counsel that a second foreclosure action should not be barred by the judge-

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made doctrine of res judicata, the action may not still be time barred.

2. *Even If the Singleton Holding Were Applicable to a Statute of Limitations, the Instant Case Does Not Fall Within the Singleton Rubric.* The Court made clear in *Singleton* that its holding did not prescribe an inviolate rule across the board, even for purposes of res judicata. The issue is how to define the limits of that holding. Respectfully, neither the District Court in the instant case, nor the Florida and federal courts that have relied upon *Singleton*, made any attempt to do so. As one commentator has written, some decisions on this issue have "expanded *Singleton* beyond its reasonable scope," "without an in-depth case-by-case analysis." "[T]he *Singleton* court did not hold that an unsuccessful mortgage foreclosure, for whatever reason, decelerates a note and mortgage, and did not address the statute of limitations." Bernhard, *Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures*, Sept./Oct. Florida Bar Journal 31, 33-34 (hereinafter "Bernhard"). It remains to determine what *Singleton did* hold.[10]

a. By Definition, Singleton Only Applies to a Dismissal with

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[10]There are decisions in other jurisdictions holding that an acceleration can never be retracted for any purpose. *See Callan v. Deutsche Bank Trust Co.*, 11 F. Supp. 3d 761 (S.D. Tex. 2014) (Tex. law) (no unilateral rescission of acceleration absent borrower's consent); *Johnson v. Samson Construction Corp.*, 704 A.2d 866 (Me. 1997); *U.S. Bank National Ass'n v. Gullotta*, 120 Ohio St. 3d 399, 899 N.E. 2d 987 (Ohio 2008).

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Prejudice, in Part Because a Dismissal Without Prejudice Has No Res Judicata Effect in the First Place.

1). Singleton's Limitation. In *Singleton*, the first action had been dismissed by the trial court *with prejudice*, for the Mortgagee's failure to appear at a case management conference. As noted, under Florida law, such a dismissal with prejudice is considered to be an adjudication on the merits, precluding a subsequent action. *See* note 3, *supra*. Moreover, in all of the examples posited by this Court in *Singleton* in which its holding would apply, the first case was disposed of on the merits, meaning that the doctrine of res judicata would otherwise prevent the action for acceleration to be brought again. Thus the Court in *Singleton*, after stating that the second action "is not necessarily barred by res judicata," 882 So. 2d at 1007, posited two examples of a disposition on the merits--that there had been no breach by the Mortgagor, or that the Mortgagee had waived the claim. *Id.* at 1007. And the Court also said that "if the plaintiff in a foreclosure action goes to trial and loses on the merits, we do not believe such a plaintiff should be barred . . . ." *Id.*

The Court's suspension in such cases of the otherwise-applicable doctrine of res judicata was expressly grounded in equitable considerations. The Court acknowledged that its holding was a "seeming variance from the traditional law of res judicata rest[ing] upon a recognition of the unique nature of the mortgage obligation,"

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and the fact "that foreclosure is an equitable remedy . . . ." *Id.* at 1007-08. A dismissal *with* prejudice is within "the traditional law of res judicata." It was only in that context that the Court in *Singleton* could "envision many instances in which [an alternative decision] would result in unjust enrichment or other inequitable results." For example, application of the doctrine of res judicata "would essentially insulate [the Mortgagor] from future foreclosure actions on the note merely because she [had] prevailed in the first action. Clearly justice would not be served . . . ." *Id.* at 1007-08.

These scenarios, plus the facts of *Singleton* itself, make clear that the case has to be dismissed with prejudice for *Singleton* to apply.[11] A resolution without prejudice has no res judicata effect in the first place; the case is completely outside the *Singleton* analysis; it threatens none of the inequities posited by the Court in *Singleton*, given that the case can be filed again; and in leaving open the possibility that the action could be re-filed, a dismissal without prejudice offers the Mortgagor no repose concerning either the particular claim or the acceleration. The only basis for such repose would be the expiration of the applicable statute of limitations.

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[11]For this purpose, it would not seem to matter whether the dismissal of the first action was voluntary or involuntary--a distinction discussed in some of the cases--so long as it terminated the first action with prejudice. Although a voluntary dismissal, even with prejudice, is not alone sufficient to communicate an intended retraction of the acceleration to the Mortgagor, which is another necessary condition, *see infra*, it is sufficient to put a permanent stop to the first action.

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2). *The Cases.* There are decisions that are consistent with this analysis in their application of *Singleton*, because the first action was dismissed with prejudice. *See Diaz v. Deutsche Bank National Trust Co.*, 2014 WL 4351411 (S.D. Fla. Sept. 2, 2014); *PNC Bank, N.A. v. Neal*, 2013 WL 5779048 (Fla. 1st DCA Oct. 25, 2013); *Star Funding Solutions, LLC v. Krondes*, 101 So. 3d 403 (Fla. 4th DCA 2012); *Capital Bank v. Needle*, 596 So. 2d 1134 (Fla. 4th DCA 1992).

Moreover, at least one Florida appellate decision, in a case decided eight years after *Singleton* in which the dismissal was without prejudice, said that if it turned out that the second action was filed outside the statute of limitations, it would be time-barred. In *Spencer v. EMC Mortgage Corp.*, 97 So. 3d 257 (Fla. 3d DCA 2012), the first action was dismissed for failure to prosecute under Rule 1.420(e), Fla. R. Civ. P.--a dismissal without prejudice.[12] The Court of Appeals said that it was unclear from the record when the initial acceleration had taken place. *See id.* at 260. The Court's primary holding was that the second action also should have been dismissed for failure to prosecute. *Id.* at 260. However, the Court also said--based upon what the record did suggest about the date of acceleration--that

> enforcement of the note and mortgage was likely barred by

[12]*See Librun v. Griffis*, 808 So. 2d 288, 289 (Fla. 1st DCA 2002); *Durie v. Hanson*, 691 So. 2d 485, 486 n. 1 (Fla. 5th DCA 1997); *Fantasy & Faux Inc. v. Webb*, 834 So. 2d 338, 339 (Fla. 5th DCA 2003).

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> the five-year statute of limitations, section 95.11(2)(c), Florida Statutes (2002). The complaint alleges that the full unpaid principal amount was due by virtue of a default on July 1, 1997. EMC's officer Mr. Colatriano swore in his affidavit that default occurred on July 1, 1997, *and* "the then title holder to the Note accelerated payment of the entire amount due and owing on the Note and Mortgage." It appears on the face of the existing record, then, that acceleration likely occurred over five years before this lawsuit was filed in late November 2002. Ms. Spencer raised the statute of limitations as an affirmative defense, and EMC did not demonstrate the absence of a genuine issue of material fact regarding that issue.
>
> But for the dismissal for failure to prosecute, Ms. Spencer would be entitled to a remand for factfinding regarding the date of acceleration, a date which plainly occurred before the maturity date of the Note and Mortgage (September 2008).

Id. (emphasis in original). Thus the Court in *Spencer* clearly stated that if the acceleration had taken place more than five years before the second action was filed, it would be time-barred. The Court also reserved on the Mortgagee's motion for fees, which it found to be potentially meritorious notwithstanding "the likelihood that this action is barred by the applicable statute of limitations . . . ." *Id.* at 261 n. 4. Judge Schwartz concurred with the decision "for two reasons," agreeing that the second action should have been dismissed for lack of prosecution, and also because "the record contains unrebutted affirmative evidence from the plaintiff's representative that a prior owner of the mortgage had appropriately accelerated it, thus triggering the

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limitations period under § 95.11(2)(c), Florida Statutes (2002), well more than five years before the commencement of this action." *Id.* at 261, 262. All of this may be *dictum*, but it clearly expressed the Court's belief that the earlier dismissal without prejudice did not provide a justification for the Mortgagee to avoid the consequences of the statute of limitations. And *Spencer* was decided after *Singleton*.[13]

In *Espinoza v. Countrywide Home Loans Servicing, L.P.*, 2014 WL 3845795, *5 (S.D. Fla. Aug. 5, 2014), the Court attempted to distinguish *Spencer* on three grounds. First, it noted that the Court in *Spencer* had only said that the action was "likely" time-barred, *Spencer* at 260. As we said, that is correct, but it does not disclaim the *Spencer* Court's unmistakable opinion on the limitations issue. Second, the Court in *Espinoza* said that the *Spencer* decision was "expressly based on a failure to prosecute." That also is correct, but it too does not disclaim the Court's opinion on the limitations issue. Third, it said that the *Spencer* Court's statement had only referred to "this action," without suggesting a universal rule. We might agree with

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[13]*See also Deutsche Bank Trust Co. Americas v. Beauvais*, 2014 WL 1869412 (Fla. Cir. Ct. Jan. 29, 2014) (*Singleton* irrelevant when first action was dismissed without prejudice and second action was filed more than five years after first suit; action time-barred); *Bank of America, N.A. v. Lynn*, 2013 WL 8357641 (Fla. Cir. Ct. Oct. 9, 2013) (same), *citing Cadle Co. v. Rhoades*, 978 So. 2d 833, 834 (Fla. 3d DCA 2008) (action filed more than five years after acceleration; the contract waived all defenses when the Mortgagee brought an action "'which is not timely barred by any applicable statute of limitations'"; the action therefore was time-barred; no mention of *Singleton*, which had been decided four years earlier).

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that as well, because the character of "this action" in *Spencer* is the same as that here --the dismissal was without prejudice. Absent a dismissal with prejudice, both *Spencer* and the instant case do not qualify. It is not possible to deny the plain meaning of what the Court in *Spencer* said.

On the other hand, a number of cases have enforced the doctrine notwithstanding that the earlier action had been dismissed without prejudice, without acknowledging that such a dismissal does not have res judicata effect.[14] The court in *Dorta* (*supra* note 14) attributed to *Singleton* the "holding that . . . if the mortgagee's foreclosure action is unsuccessful for *whatever reason*, the mortgagee still has the right to file later foreclosure actions--and to seek acceleration of the entire debt--so long as they are based on separate defaults." 2014 WL 1152917, *6 (emphasis added). *See also Matos, supra* note 14 (holding that under *Singleton* "adjudication denying acceleration and foreclosure . . . does not bar a subsequent action"). As noted, however, this Court made clear in *Singleton* that the Mortgagee cannot return to the *status quo ante* "for whatever reason." Nor do any of the cited

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[14] *See Espinoza v. Countrywide Home Loans Servicing, L.P.*, 2014 WL 3845795 (S.D. Fla. Aug. 5, 2014); *Matos v. Bank of New York*, 2014 WL 3734578 (S.D. Fla. July 28, 2014); *Dorta v. Wilmington Trust National Ass'n*, 2014 WL 1152917 (M.D. Fla. March 24, 2014) (Appeal stayed by U.S. Court of Appeals for the Eleventh Circuit, pending outcome of *Bartram*; Case No. 14-11884, Order of October 9, 2014); *Kaan v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1271 (S.D. Fla. 2013) (but no discussion of acceleration).

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cases address the fact that *Singleton*'s relaxation of the principle of res judicata cannot apply in the first place to a dismissal without prejudice, which is already without res judicata effect, and that the policies underlying *Singleton* necessarily counsel that the initial disposition has to be with prejudice.[15]

It is respectfully submitted that the cited decisions apply *Singleton* without recognizing the limited nature of its holding. So long as the first action may be revived, its dismissal is not res judicata, and does not put the parties "back in the same contractual relationship with the same continuing obligations." *Singleton*, 882 So. 2d at 1007.

b. Even Where Singleton Applies, Any Attempt to Retract an

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[15]There are also several decisions holding that the second action was not precluded, without disclosing whether the earlier action had been dismissed with prejudice or without. *See, e.g., Torres v. Countrywide Home Loans, Inc.*, 2014 WL 3742141 (S.D. Fla. July 29, 2014); *Ros v. Lasalle Bank National Ass'n*, 2014 WL 3974558 (S.D. Fla. July 18, 2014); *Poole v. Aurora Loan Services, LLC*, 2014 WL 3378344 (M.D. Fla. June 30, 2014); *Romero v. SunTrust Mortgage, Inc.*, 2014 WL 1623703 (S.D. Fla. April 22, 2014); *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So. 3d 954 (Fla. 4th DCA 2014); *Olympia Mortgage Corp. v. Pugh*, 774 So. 2d 863, 866-67 (Fla. 4th DCA 2000), *review denied*, 791 So. 2d 1100 (Fla. 2001) (third action not barred under two-dismissal rule). *See also Verdecia v. Bank of New York as Trustee for the Certificate Holders CWABS, Inc.*, 2014 WL 3767668 (S.D. Fla. July 31, 2014) (reviews case law on this question, but the court declined to reach it, in finding that the plaintiff did not have standing to bring the action). The court in *Torres, supra,* did say that the second action is not time-barred when the first action was "dismissed for any reason." 2014 WL 3742141, *4. But this Court said otherwise in *Singleton*, and neither *Torres* nor the other cited cases discussed the significance of a dismissal with or without prejudice.

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Acceleration Must Be Promptly and Unequivocally Communicated to the Mortgagor. Even when an action has been dismissed with prejudice, that does not tell the Mortgagor that the Mortgagee thinks that acceleration remains available, and that it reserves the right to do so. Based on the balance of equities, even when the dismissal is with prejudice, *Singleton* should be limited to cases in which the Mortgagee has quickly, clearly and unequivocally communicated to the Mortgagor a retraction of its prior acceleration. For one thing, such notice might give the Mortgagor the opportunity to prevent foreclosure by paying any past-due installments at a lower non-default rate. Just as the decision to accelerate must be clearly communicated,[16] it is equally important that any decision to withdraw an acceleration be communicated.[17] A dismissal with prejudice may be enough to terminate the litigation, but it still does not tell the Mortgagor that the Mortgagee expects payments

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[16]*See Kreiss Potassium Phosphate Co. v. Knight*, 98 Fla. 1004, 1012, 124 So. 751, 754 (1929); *Rones v. Charlisa, Inc.*, 948 So. 2d 878, 879 (Fla. 4th DCA 2007); *Pici v. First Union National Bank of Florida*, 621 So. 2d 732, 734 (Fla. 2d DCA), *review denied*, 629 So. 2d 132 (Fla. 1993); *Parise v. Citizens National Bank*, 438 So. 2d 1020, 1022 (Fla. 5th DCA 1983); *Central Home Trust Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1980).

[17]*See Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158 (Nev. 2009) ("Because an affirmative act is necessary to accelerate a mortgage, the same is needed to decelerate. Accordingly, deceleration, when appropriate, must be clearly communicated by the lender/holder on the note, to the obligor"); *Burney v. Citigroup Global Markets Realty Corp.*, 244 SW 3d 900, 903 (Tex. Ct. App. 2008).

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to continue, and might show up several years later to collect them. Therefore, something more than a dismissal is required.[18]

Moreover, a dismissal, even with prejudice, is doubly insufficient if the Mortgagee had previously asserted its right to accelerate in some manner in addition to filing the first foreclosure action. As Bernhard puts it at 34:

> The result in [*Olympia Mortgage Corp. v. Pugh*, 774 So. 2d. 863 (Fla. 4th DCA 2000), *review denied*, 791 So. 2d 1100 (Fla. 2001)] might have been different if the lender had made an independent statement of intent to accelerate

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[18]*See Murphy v. HSBC Bank USA*, 2014 WL 1653081 (S.D. Tex. April 23, 2014); *Clawson v.GMAC Mortgage, LLC*, 2013 WL 1948128, *1, 3 (S.D. Tex. May 9, 2013) (notice of rescinding had been recorded); *Wood v. Fitz-Simmons*, 2009 WL 580784 (Ariz. Ct. App. March 6, 2009) (affirmative act required; acceptance of partial payments not enough); *Mitchell v. Federal Land Bank of St. Louis*, 174 S.W 2d 671 (Ark. 1943) (more than mere dismissal is required); *Barnwell v. Hanson*, 57 S.E. 2d 348, 353 (Ga. Ct. App. 1950) (acceptance of part payment not enough); *Curran v. Houston*, 66 N.E. 228, 230 (Ill. 1903) (acceptance of interest after forfeiture not enough); *Van Vlissingen v. Lenz*, 49 N.E. 422, 424 (Ill. 1897) (acceptance of interest not enough); *Paul Londe & Associates, Inc. v. Rathert*, 522 S.W. 2d 609, 610-11 (Mo. Ct. App. 1975) (acceptance of payment not enough); *Driessen-Rieke v. Steckman*, 409 N.W. 2d 50, 52-53 (Minn. Ct. App. 1987); *Swan v. Jones*, 173 P. 249, 250 (Or. 1918) (acceptance of interest payment not enough); *Clayton National, Inc. v. Guldi*, 763 N.V.S. 2d 493, 494 (N.Y. App. Div. 2003) (dismissal for lack of jurisdiction not "affirmative act"); *Arbisser v. Gelbelman*, 286 A.D. 2d 693, 730 N.Y.S. 2d 157, 158 (2001), *leave to appeal denied*, 97 N.Y. 2d 612, 769 N.E. 2d 352 (2002); *EMC Mortgage Corp. v. Patella*, 279 A.D. 2d 604, 720 N.Y.S. 2d 161 (2001) (same); *Federal National Mortgage Ass'n v. Mebane*, 208 A.D. 892, 618 N.Y.S. 2d 88, 89-90 (1994); *Cadle Co. II, Inc. v. Fountain*, 281 P.3d 1158 (Nev. 2009) (same); *Khan v. GBAK Properties, Inc.*, 371 S.W. 3d 347, 355 (Tex. Ct. App. 2012) (verbal agreement to reinstate note). *See also* Bernhard at 36 ("distinct and evident deceleration" required).

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> prior to filing its foreclosure action because a return to status quo ante through a voluntary dismissal would not have eliminated the independent statement of intent to accelerate. The borrower or the court could have pointed to the remaining notice and argued that it was unaffected evidence of acceleration and the expiration of the statute of limitations, in which case, the voluntary dismissal would not have undone the acceleration.

Although we contend that a voluntary dismissal is not sufficient notice in all events, it is doubly insufficient where the Mortgagee had sent the Mortgagor a separate Notice of Acceleration which it never retracted.[19] If the Mortgagee is to place the parties "back in the same contractual relationship with the same continuing obligations," *Singleton*, 882 So. 2d at 1007, then the Mortgagor must know it. Given that the balance struck in *Singleton* is "equitable" in nature, consistent with the "ends of justice," *id.* at 1008, that objective cannot be achieved unless the Mortgagor has been informed immediately and without qualification of the Mortgagee's intention to return to the *status quo ante.* Thus, as noted, *supra* note 18, numerous cases have held that something more than dismissal of the lawsuit is required. As the court said in *EMC Mortgage Corp. v. Patella*, 279 A.D. 2d 604, 606, 720 N.Y.S. 2d 161 (2001), "[a]lthough a lender may revoke its election to accelerate the mortgage, the dismissal

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[19]Here the Mortgage Note required pre-suit notice of acceleration (R. 261, ¶22); U.S. Bank alleged that all conditions precedent to acceleration had been satisfied (*see* R. 470, ¶8); and Bartram did not traverse that allegation (*see* Plantation's District Court Answer Brief, App. 2).

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of the prior foreclosure action by the court did not constitute an affirmative act by the lender revoking its election to accelerate, and the record is barren of any affirmative act of revocation occurring during the six-year Statute of Limitations period subsequent to the initiation of the prior action. . . . Consequently, this foreclosure action is time-barred . . . ." In the instant case, there was no communication of any kind.

c. Even Where Singleton Applies, it Is Grounded in the Equities of a Given Case, and the Equities Here Overwhelmingly Favor the Mortgagor. We have made this point already. *See supra* pp. 12-13, 24. In addressing the balance of equities in *Singleton*, this Court said only that "justice would not be served if the mortgagee was barred from challenging the subsequent default payment *solely* because he failed to prove the earlier alleged default." 882 So. 2d at 1007-08. In the instant case, there is much more to the balance of equities. U.S. Bank's dereliction in this case was significant and inexcusable. The prejudice caused by its belated conduct is significant. If one party is to bear the consequences in the balance of equities, it is U.S. Bank.

d. The Parties Can Make Their Own Contract on the Question of Acceleration. Finally, there is nothing in *Singleton* that addresses the extent to which the parties themselves can make their own agreement as to what happens when the

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Mortgagee announces an acceleration--that is, whether and how it might be retracted. To the contrary, the Court's emphasis in *Singleton* upon the "equities" and the "ends of justice," 882 So. 2d at 1008, would seem to undermine any attempt by the Mortgagee to escape the terms of its own Contract.

Both the Florida Constitution and the United States Constitution preclude the impairment of contracts. *See* Art. I, §10, United States Constitution ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts"); Art. I, §10, Florida Constitution ("No . . . law impairing the obligations of contract shall be passed"). Thus the sanctity of contracts imposes "an obligation of the courts which has constitutional dimensions." *David v. Sun Federal Savings & Loan Ass'n*, 461 So. 2d 93, 94 (Fla. 1984). And this Court has enforced the "well-accepted principle that virtually no degree of contract impairment is tolerable." *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 780 (Fla. 1979).[20]

This principle applies no less to a Mortgage agreement than to any other. *See* David at 23 ("it is well established . . . that an acceleration clause or promise in a mortgage confers a contract right . . . ."); *Old Republic Ins. Co. v. Lee*, 507 So. 2d 754

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[20]*See Quinerly v. Dundee Corp.*, 159 Fla. 219, 31 So. 2d 533, 534 (1947); *Rosenstein v. Rosenstein*, 976 So. 2d 1148, 1149 (Fla. 4th DCA 2008); *Reed v. Lincoln*, 731 So. 2d 104, 106 (Fla. 5th DCA 1999); *Old Republic Ins. Co. v. Lee*, 507 So. 2d 754, 755 (Fla. 5th DCA 1987).

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(Fla. 5th DCA 1987) (reversible error to reinstate mortgage where the contractual period of time in which to do so had expired). And the sanctity of a contract extends no less to the remedies provided for its breach than to any other provision: "Generally, where the parties to a contract have agreed upon a remedy in the event of a breach, their agreement will control, provided the remedy is 'mutual, unequivocal and reasonable.'" *Seaside Community Development Corp. v. Edwards*, 573 So. 2d 142, 147 (Fla. 1st DCA 1991). The right to foreclose and redeem the property requires adherence to the terms of the Mortgage Contract.[21] Any attempt to retract the terms of a foreclosure should do so as well.

In the instant case, both the Bank's right to accelerate and *Bartram*'s right to reinstate the Mortgage are defined in the Note. The right to accelerate is found in ¶22 (R. 261); and the right of reinstatement is found in ¶19, giving the *Mortgagor* the power to reinstate the Mortgage if certain conditions are met (*see* R. 259). The Borrower can reinstate:

> If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Interest discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period

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[21] *See Voght v. Galloway*, 291 So. 2d 579, 581 (Fla. 1974), *citing Hume v. G.L. Miller Bond & Mortgage Co.*, 118 So. 3 (Fla. 1928); *DiSalvo v. SunTrust Mortgage, Inc.*, 115 So. 3d 438, 439 (Fla. 2d DCA 2013).

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> as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Interest. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. . . . Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. . . .

In contrast, the Note makes no provision for the Lender to reinstate the Mortgage. And when a contract says one thing about a specific matter while omitting something else, it connotes an intention to do so. The doctrine is *expressio unius est exclusio alterius*--the expression of one thing implies the exclusion of another. *See Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996). The doctrine applies to contracts as well as statutes.[22] Here the Contract speaks expressly

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[22]*See Shumrak v. Broken Sound Club, Inc.*, 898 So. 2d 1018, 1020 (Fla. 4th DCA 2005) ("It is a fundamental principle of contract construction, known as *expressio unius est exclusio alterius*, that 'the expression of one thing is the exclusion of the other'"), *quoting Coral Cadillac v. Stephens*, 867 So. 2d 556, 558 (Fla. 4th DCA), *review dismissed*, 884 So. 2d 21 (Fla. 2004); *Sugar Cane Growers Co-Op. of*

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to the parties' respective options with respect to acceleration. Their agreement is inconsistent with the rights that otherwise might be available under *Singleton*, and under both the Florida Constitution and the United States Constitution, their agreement should prevail.

Therefore, the doctrine announced in *Singleton* does not apply to a statute-of-limitations defense. And even if it did, that doctrine does not apply here. The dismissal was without prejudice; the Mortgagor was not told of any intention to retract the acceleration; the equities overwhelmingly favor the Mortgagor's position; and the parties made their own agreement on the subject of acceleration.

VI.
CONCLUSION

It is respectfully submitted that the decision of the District Court should be disapproved, and the cause remanded for further proceedings.

Florida, Inc. v. Pinnock, 735 So. 2d 530, 535 (Fla. 4th DCA), *review denied*, 744 So. 2d 456 (Fla. 1999); 3 Corbin on Contracts §552.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner has been served via e-mail upon all counsel on the attached Service List on this 5th day of November, 2014.

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that this computer-generated Brief is in compliance with the font requirements of Rule 9.210(a)(2), Fla. R. App. P. as submitted in Times New Roman 14-point.

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