Filing # 20663616 Electronically Filed 11/17/2014 05:13:36 PM

RECEIVED, 11/17/2014 17:19:09, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

Case No. SC 14-1265 (consolidated with Case Nos. SC-141266 and SC14-1267)

LEWIS BROOKE BARTRAM and
THE PLANTATION AT PONTE
VEDRA, Inc.,

Petitioners,

v.

U.S. BANK NATIONAL
ASSOCIATION, ETC., ET AL.,

Respondents.

On Appeal from the Fifth District Court of Appeals of Florida
L.T. Case No. 5D12-3823

AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE FILED ON BEHALF OF PETITIONERS

Todd L. Wallen, Fla. Bar No. 151203
todd@wallenlawfirm.com
The Wallen Law Firm, P.A.
255 Aragon Avenue, Third Fl.
Coral Gables, Florida 33134
Attorney for Amicus Curiae CAI
Telephone: (305) 501-2864
Fax: (305) 721-1681

Steven M. Siegfried, Fla. Bar No. 208851
ssiegfried@srhl-law.com
Nicholas D. Siegfried, Fla. Bar No. 27020
nsiegfried@srhl-law.com
Nicole R. Kurtz, Fla. Bar No. 109711
nkurtz@srhl-law.com
Siegfried, Rivera, Hyman, Lerner,
De La Torre, Mars & Sobel, P.A.
201 Alhambra Circle, 11th Floor
Coral Gables, Florida 33134
Attorneys for Amicus Curiae CAI
Telephone: (305) 442-3334
Fax: (305) 443-3292

CASE NO. SC14-1265

TABLE OF CONTENTS

Page No.

TABLE OF CITATIONS……………………………..…………………… 3

IDENTITY AND INTEREST OF AMICUS CURIAE…………………….…...6

SUMMARY OF THE ARGUMENT……………………………………………8

ARGUMENT……………………………………………………………………9

1. THE DECISION BELOW IS MISGUIDED AS THE *SINGLETON* DECISION DID NOT ADDRESS, MUCH LESS ALTER, THE LEGISLATIVELY-MANDATED LIMITATION PERIODS SET FORTH IN THE STATUTE OF LIMITATIONS………………………………..………….....……9

    a. Fundamental Principals………………..…………………..9

    b. The Fifth District Misapplied *Singleton* and Failed to Recognize the Effect of the Lender's Decision to Accelerate……………………………………………..….14

    c. The Dismissal of the First Foreclosure Action Did Not Constitute a Determination that the Lender had No Right to Accelerate and Cannot Result in an Automatic Reinstatement of the Installment Contract's Terms and Obligations……………………………………………...19

2. COMMUNITY ASSOCIATIONS WILL BE MATERIALLY PREJUDICED, AND IN EFFECT, EXPERIEINCE AN UNREASONABLE RESTRAINT ON ALIENATION IF THE DECISION BELOW IS UPHELD………...……………………………………………...22

CONCLUSION…………………………………………………………..….26

CERTIFICATE OF SERVICE…………………………………………………..…26

CERTIFICATE OF COMPLIANCE……………………………………...……26

TABLE OF CITATIONS

Page No.

Cases

Arlaine & Gina Rockey, Inc. v. Cordis Corp.,
2004 WL 5504978 (S.D. Fla. 2004)……………….………………..….10, 12, 18

Arvelo v. Park Finance of Broward, Inc.,
15 So. 3d 660 (Fla. 3d DCA 2009)……………………………………..…..13, 18

Brauch v. Bank of America Corp.,
2005 WL 1027907 (M.D. Fla. 2005)…………………………………..……….20

Campbell v. Werner,
232 So. 2d 252 (Fla. 3d DCA 1970)……………………………..……10, 11, 19, 20

Casino Espanol de Habana, Inc. v. Bussel,
566 So. 2d 1313 (Fla. 3d DCA 1990)……………………..…………...11, 13, 16

Central Home Trust. Co. of Elizabeth v. Lippincott,
392 So. 2d 931 (Fla. 5th DCA1980)……………………………………..….10

Davis v. Starling,
799 So. 2d 373 (Fla. 4th DCA 2001)……………………………….…………..25

Dorta v. Wilmington Trust, N.A.,
2014 WL 1152917 (M.D. Fla., March 24, 2014)………………………...…….21

Erwin v. Crandall,
175 So. 862 (Fla. 1937)…………………………………………………...…..11, 16

Garden Isles Apts.No. 3, Inc. v. Connolly,
546 So. 2d 38 (Fla. 4th DCA 1989)………………………………………….21

Greene v. Bursey,
733 So.2d 1111 (Fla. 4th DCA 1999)……………………..………………...9, 10

In re Brown,
2014 WL 983532 (M.D. Fla., February 11, 2014)……………………………12, 18

In re Tavern Motor Inn, Inc.,
69 B.R. 138 (D.Vt. 1986)………………………………..……………………..11

In re White,
88 B.R. 498 (D. Mass. 1988)……………………………………………..…….11

Flagler v. Flagler,
94 So. 2d 592 (Fla. 1957)……………………………………………...……….25

Kroop v. Carvelle Condominium, Inc.,
323 So. 2d 307 (Fla. 3d DCA 1975)………………………………………………25

LaSalle Bank Nat'l Ass'n v. Shepherd Mall Ptners, L.L.C.,
2006 OK CIV APP 91……………………………………………………………..11

Laws v. Laws,
364 So. 2d 798 (Fla. 4th DCA 1978)…………………………………...……25

Monte v. Tipton,
612 So. 2d 714 (Fla. 2d DCA 1993)……………………………...…...…….10

Nordberg v. Green,
638 So. 2d 91 (Fla. 3d DCA 1994)………………………………………..……….25

Olson v. Hirschbeg,
145 So. 2d 303 (Fla. 1st DCA 1962)……………………………………….16, 17

Rizzo v. Pierce & Associates,
351 F. 3d 791 (7th Cir. 2004)……………………………………………………11

Servicios de Almacen Fiscal Zona Franca y Mandatos, S.A. v. Ryder Int'l, Inc.,
264 Fed. Appx. 878 (11th Cir. 2008)………………………..………..……..21

Singleton v. Greymar Assocs.,
882 So. 2d 1004 (Fla. 2004)…………………………...…….8, 9, 14, 15, 16, 18, 20

Smith v. F.D.I.C.,
61 F.3d 1552 (11th Cir. 1995)……………………………………..……….12, 18

Spencer v. EMC Mortgage Corp.,
97 So. 3d 257 (Fla. 3d DCA 2012)……………………………..……9, 12, 17

Travis Co. v. Mayes,
36 So. 2d 264 (Fla. 1948)……………………………………………..……12, 17

U.S. Bank Nat'l Ass'n v. Bartram,
140 So. 3d 1007 (Fla. 5th DCA 2014)………………..………….……….8, 14, 15

U.S. Bank Nat'l. Ass'n v. Tadmore,
23 So. 3d 822 (Fla. 3d DCA 2009)……………………………………..………25

Wells Fargo Bank Minnesota N.A. v. Guarnieri,
308 B.R. 122 (D. Conn. 2004)…………………………………………….…12

Statutes

§ 95.11(2)(c) (2014), Florida Statutes…………………………………...8, 9, 13, 23

§ 718.116(1)(b) (2014), Florida Statutes……………………………………..…….7

§ 718.116(6)(a) (2014), Florida Statutes……………………………….…………23

§ 720.3085(2)(c) (2014), Florida Statutes…………………………………………7

IDENTITIY AND INTEREST OF AMICUS CURIAE

This brief is filed on behalf of Community Associations Institute ("CAI"), which is an international organization dedicated to building and inspiring professional, informed, and harmonious community associations by providing information, education, and resources to all community association constituents, including community managers, volunteer homeowner leaders, contractors, developers, attorneys, and other community leaders who provide services to community associations. CAI submits this brief to address the following central issue: Whether a lender can avoid the statute of limitations through the simple expedient of filing a foreclosure action and allowing it to be dismissed either voluntarily or on procedural grounds.

With the current economic landscape in Florida, CAI's Florida Chapters devote a significant amount of their resources to educating community association leaders as to the associations' role in the foreclosure process. The associations' foreclosure process is relevant to this case because, when owners within community associations are delinquent in their assessment payments, community association leaders are forced, through their role as fiduciaries to the other owners within the associations, to foreclose upon the associations' liens, and often take title at auction. In many instances, these properties are also encumbered by a mortgage lien. Because of the mortgage lien, which often exceeds the value of the

property, community associations are frequently unable to sell the properties and must expend significant funds to ensure the properties are and conform to community standards.

These undue costs can be limited significantly if lenders are required to exercise their rights within the five years deemed reasonable by the Florida legislature. If a lender forecloses and the property is sold at auction, either to a third-party buyer or if the lender takes title itself, then the new owner is responsible for paying the maintenance and assessments to the community association. If the lender is allowed to sit on its rights, however, these assessments are not paid to the association and the association must take action to maintain the property—all the while, the lender's security interest is protected (if not enhanced) at the cost of the community association. Further, the dilatory lender enjoys the added benefit of knowing that, when it eventually forecloses on the property, its liability for assessments is limited under Chapters 718 and 720 of the Florida Statutes.[1]

---

[1] Even when a lender does acquire title to a unit by foreclosure it enjoys a limitation of liability for assessments due on the property. *See* Sections 718.116(1)(b) and 720.3085(2)(c), Florida Statutes. The liability of a first mortgagee or its successor or assignees who acquire title to a unit by foreclosure or by deed in lieu of foreclosure for the unpaid assessments that became due before the mortgagee's acquisition of title is limited to the lesser of:

a. The unit's unpaid common expenses and regular periodic assessments which accrued or came due during the 12 months immediately preceding the acquisition of title and for which payment in full has not been received by the association; or

The outcome of this case critically impacts the interests of the above-described CAI constituents.

SUMMARY OF THE ARGUMENT

As soundly argued by Petitioners in their initial briefs, the Fifth District Court of Appeals' ("Fifth District") decision below in *U.S. Bank Nat'l Ass'n v. Bartram,* 140 So. 3d 1007 (Fla. 5th DCA 2014), which provides lenders with an extended opportunity to foreclose upon mortgages recorded against real property after they have failed to initiate foreclosure actions within five (5) years from their election to accelerate all remaining payments due on the note, should be reversed as it not only fundamentally misinterprets this Court's opinion in *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004) and fails to adhere to the precepts of the statute of limitations for foreclosing a mortgage as delineated in Section 95.11(2)(c), Florida Statutes, but it also materially deprives condominium associations of property interests acquired through their own foreclosure actions and requires them to incur unnecessary costs for indeterminate periods of time.

For the reasons that follow, the judgment entered below should be reversed.

---

b. One percent of the original mortgage debt. The provisions of this paragraph apply only if the first mortgagee joined the association as a defendant in the foreclosure action. Joinder of the association is not required if, on the date the complaint is filed, the association was dissolved or did not maintain an office or agent for service of process at a location which was known to or reasonably discoverable by the mortgagee.

ARGUMENT

1. THE DECISION BELOW IS MISGUIDED AS THE *SINGLETON* DECISION DID NOT ADDRESS, MUCH LESS ALTER, THE LEGISLATIVELY-MANDATED LIMITATION PERIODS SET FORTH IN THE STATUTE OF LIMITATIONS.

We concur with the comprehensive arguments asserted by Petitioners, in that the Fifth District's decision below is based upon a misapplication of this Court's decision in *Singleton* and a failure to adhere to the legislative intent of Section 95.11(2)(c), Florida Statutes.

A. Fundamental Principals

Mortgage contracts are installment contracts, meaning that, by their terms, the mortgagors may repay their debts by making payments on a monthly basis. When a mortgagor fails to make payment on such an installment contract, the party with the right to receive payment can: (1) sue only for the default or defaults on the installment(s) already past due—and thereby preserve its cause of action pertaining to future defaults if they occur; or (2) if the agreement contains an "acceleration" clause, the lender can declare a default on all future installments and seek recovery of the total amount due under the contract. *See Greene v. Bursey*, 733 So.2d 1111, 1114-15 (Fla. 4th DCA 1999).

If the lender elects the latter, then the acceleration occurs when the lender "takes affirmative action to alert the debtor that [it] has exercised the option to accelerate." *Id.* at 1115 (emphasis added); *see also Spencer v. EMC*

Mortgage Corp., 97 So. 3d 257, 260 (Fla. 3d DCA 2012) (applying *Greene*); *Arlaine & Gina Rockey, Inc. v. Cordis Corp.*, 2004 WL 5504978, *48 (S.D. Fla. 2004). One way to alert the debtor that the mortgagee has exercised the option to accelerate is to actually file a foreclosure action seeking payment of the full amount due under the note. *See Campbell v. Werner*, 232 So. 2d 252, 254 n.1 (Fla. 3d DCA 1970) ("[T]he filing of suit to foreclose operates as notice to the mortgagor of the election to accelerate … where the complaint on its face shows that foreclosure for the entire mortgage indebtedness is sought therein."). A lawsuit is not necessary, however; other affirmative acts to alert the debtor of the election will suffice. *See Monte v. Tipton*, 612 So. 2d 714, 716 (Fla. 2d DCA 1993) (demand of "total principal balance and interest by letter" operated as acceleration of debt); *see also Central Home Trust. Co. of Elizabeth v. Lippincott*, 392 So. 2d 931 (Fla. 5th DCA1980) ("To constitute an acceleration after default … the holder or payee of the note must take some clear and unequivocal action indicating its intent to accelerate all payments under the note … Examples of acceleration are a creditor's sending written notice to the debtor, making an oral demand, and alleging acceleration in a pleading filed in a suit on the debt.").

When a lender "elects to accelerate payment on a note, [moreover,] the lender accelerates the maturity of the note itself" and "the maturity date of the note

accelerate[s] to the present—the date of default and of notice." *Casino Espanol de Habana, Inc. v. Bussel*, 566 So. 2d 1313, 1314 (Fla. 3d DCA 1990) (emphasis added). *See also Erwin v. Crandall*, 175 So. 862, 863 (Fla. 1937) (It is well settled that the "holder of a note may rely upon acceleration clause contained in the mortgage … to accelerate the maturity of the note."). The act of acceleration, by definition, means that the mortgagor no longer has a right to repay his or her debt in installments. *See Campbell*, 232 So. 2d at 257 ("A willingness of a mortgagor to cure a default, after notice that the mortgagee has exercised his election to declare the entire mortgage indebtedness due for such default, is not a circumstance which is recognized in law or equity as a ground for denying acceleration and foreclosure."). Consequently, absent compliance with a contractual "reinstatement" provision or proof that the lender had no right to accelerate in the first place, **there can be no new default after the right to accelerate is exercised**.[2]

---

[2] Even late fees stop accruing once a lender accelerates a loan. In *LaSalle Bank Nat'l Ass'n v. Shepherd Mall Ptners, L.L.C.*, 2006 OK CIV APP 91, for example, an Oklahoma court held that "a 5% late fee to the entire amount due after acceleration constitutes an unenforceable penalty *LaSalle Bank Nat'l Ass'n v. Shepherd Mall Ptners, L.L.C.*, 2006 OK CIV APP 91, 94. *See also In re Tavern Motor Inn, Inc.*, 69 B.R. 138 (D.Vt. 1986) (prohibiting collection of late charges after default and acceleration); *In re White*, 88 B.R. 498, 505 (D. Mass. 1988) (late charges allowed only until acceleration); *Rizzo v. Pierce & Associates*, 351 F. 3d 791, 793, n.1 (7th Cir. 2004) (citing sixteen cases for the proposition that post- acceleration late charges are unenforceable);

Because the debt is fully mature at the time of acceleration, any cause of action to enforce the note and mortgage accrues upon acceleration and the statute of limitations is triggered on that date. *See Travis Co. v. Mayes*, 36 So. 2d 264, 265 (Fla. 1948) ("When a [mortgagee] declares the entire indebtedness due upon default of certain of [the mortgage's] provisions or within a reasonable time thereafter, the Statute of Limitations begins to run immediately [when] the default takes place or the time intervenes."); *Spencer*, 97 So. 3d at 260, 262; *Smith v. F.D.I.C.*, 61 F.3d 1552, 1561 (11th Cir. 1995) ("When the promissory note secured by a mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked."); *In re Brown*, 2014 WL 983532, *1 (M.D. Fla., February 11, 2014) ("Where a lender has accelerated a loan and made the borrower responsible for the full balance of the loan, the statute of limitations begins to run at the time when the mortgagee exercises the right to accelerate."); *Arlaine & Gina Rockey, Inc. v. Cordis Corp.*, 2004 WL 5504978, *48 (S.D. Fla. 2004) ("Where the installment contract contains an optional acceleration clause, the statute of limitations may commence running

---

Wells Fargo Bank Minnesota N.A. v. Guarnieri, 308 B.R. 122, 127 (D. Conn. 2004) (post-acceleration late payment charges unenforceable). This line of cases is consistent with the proper interpretation of acceleration – that there cannot be new default after the bank calls the entire amount due.

earlier on payments not yet due if the holder exercises its right to accelerate the total debt due because of default. In that situation, 'the entire debt … becomes due when the creditor takes affirmative action to alert the debtor that he has exercised the option to accelerate.'" (citations omitted)); *see also Arvelo v. Park Finance of Broward, Inc.*, 15 So. 3d 660, 662-63 (Fla. 3d DCA 2009) ("All of that indebtedness had, in fact, become due upon the March 2002 default and the automatic acceleration of the debt as specified in the form installment contract. Upon the occurrence of that event, Park Finance's cause of action for breach of contract had fully accrued, and the five-year statute of limitations began to run.").

The statute of limitations for contract actions such as this is five years. *See* § 95.11(2)(c), Fla. Stat. This five year period corresponds with the statute of repose, furthermore, which provides that a mortgage lien "terminate[s]" five years after the debt matures.[3] *See* § 95.281, Fla. Stat.; *see also Casino Espanol de Habana Inc.*, 566 So. 2d at 1314 ("'Acceleration' is a change in the date of maturity from the future to the present."). Consequently, any action to enforce a note and mortgage following acceleration must be filed within five years of the

[3] It would make little sense for the mortgage lien to remain valid after it can no longer be enforced by application of the statute of limitations. The continued existence of the unenforceable lien could only cause confusion and hesitation among potential buyers if the property is subsequently auctioned or put up for sale—although, ultimately, the parties to any subsequent transaction could simply ignore the lien because, again, it cannot be enforced.

acceleration election and, if the action is not pursued within that time frame, the mortgage lien automatically terminates.

B. The Fifth District Misapplied *Singleton* and Failed to Recognize the Effect of the Lender's Decision to Accelerate.

The Fifth District misapplied this Court's decision in *Singleton* in concluding that a lender can continue to declare a borrower to be in default and, hence, re-start the running of the statute of limitations, after it exercises its right to accelerate the debt. The *Singleton* decision says no such thing.

In the action below, the mortgagor filed a quiet title action seeking a declaration that he was no longer required to make monthly mortgage payments because: 1) the mortgagee accelerated the debt and initiated a foreclosure action in 2006; 2) that action had been dismissed; and 3) no new action had been filed more than five years after the filing of the first action. *See Bartram*, 140 So. 3d at 1009. The trial court granted summary judgment for the mortgagor and canceled the mortgage lien, concluding that the lender no longer had the ability to enforce its rights under the note. *Id.*

On review, the Fifth District began its analysis by noting that "there is no question of the Bank's successful acceleration of the entire indebtedness on May 15, 2006." *Id.* Rather than recognizing that the effect of the lender's acceleration was that the debt became fully mature and applying the statute of limitations to any effort to collect this debt, however, the Fifth District

concluded that the obligation to make payments in installments was somehow reinstated following the dismissal of the initial foreclosure action and that the lender would have a right to accelerate the debt again based on subsequent defaults. It justified its conclusion that the installment contract had essentially been reinstated following dismissal by focusing on one sentence at the end of this Court's *Singleton* opinion, where this Court stated: "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." *See id.* at 1013 (citing *Singleton*, 882 So. 2d at 1008).

The lower court ignored, however, that this Court did not hold that there are always "subsequent and separate" defaults following dismissal of a foreclosure action. Indeed, it merely *assumed* that there was a subsequent and separate default in the *Singleton* case, in comparing the first cause of action to the second cause of action for *res judicata* purposes. The issue of whether a subsequent default is even possible after acceleration was not decided by this Court. Nevertheless, because of this one sentence, the Fifth District reasoned that:

> [i]f a 'new and independent right to accelerate' exists in a res judicata analysis, there is no reason it would not also exist vis-à-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 that their due dates had been accelerated in the prior suit.

Id.

The Fifth District's analysis ignores the fundamental principle that, following acceleration, there are no "new defaults" on which "new causes of action" can be based—absent contractual "reinstatement" or a finding that the lender had no right to accelerate in the first place. Again, the act of accelerating the debt "accelerates the maturity of the note itself," *see Casino Espanol de Habana, Inc.*, 566 So. 2d at 1314 (citing *Erwin*, 175 So. at 863), and cuts off the right of the mortgagor to even make installment payments thereafter; there simply cannot be new defaults or new rights to accelerate following acceleration, *see Olson v. Hirschbeg*, 145 So. 2d 303, 305 (Fla. 1st DCA 1962) ("[O]bviously there could be no acceleration after the note had matured."), and this Court did not hold otherwise in *Singleton*.

In applying *Singleton* to this case, furthermore, the Fifth District failed to recognize the fundamental difference between *res judicata* and the statute of limitations. The *Singleton* opinion focused exclusively on whether the causes of action in two lawsuits were sufficiently identical to trigger application of *res judicata*; it was not focused on when the cause of action first could have been asserted, as would have been required for a statute of limitations analysis. The confusion of these issues is evident from the fact that the lower court

unnecessarily infused *res judicata* components into its certified question to this Court—phrasing the question as whether "acceleration of payments due under a note and mortgage **in a foreclosure action that was dismissed** … trigger[s] application of the statute of limitations to prevent a subsequent foreclosure action … **based on all payment defaults occurring subsequent to dismissal of the first foreclosure suit**." *Id.* at *6 (emphasis added). Whether the initial foreclosure action was "dismissed," however, has no bearing on when the right to proceed with the action "accrued" and, hence, it is irrelevant to statute of limitations analysis.

If the lower court had simply asked whether "acceleration of payments due under a note and mortgage triggers application of the statute of limitations to prevent a subsequent foreclosure action" five years later (without the bolded language quoted above), the answer would unquestionably be "yes." *See Travis*, 36 So. 2d at 265 ("When a [mortgagee] declares the entire indebtedness due upon default of certain of [the mortgage's] provisions or within a reasonable time thereafter, the Statute of Limitations begins to run immediately [when] the default takes place or the time intervenes."); *Spencer*, 97 So. 3d at 262 ("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 limitations period … well more than five years before

commencement of this action."); *Smith*, 61 F. 3d at 1561 ("When the promissory note secured by a mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked."); *In re Brown*, 2014 WL 983532 at *1 ("Where a lender has accelerated a loan and made the borrower responsible for the full balance of the loan, the statute of limitations begins to run at the time when the mortgagee exercises the right to accelerate."); *Arlaine & Gina Rockey, Inc*, 2004 WL 5504978 at *48 ("Where the installment contract contains an optional acceleration clause, the statute of limitations may commence running earlier on payments not yet due if the holder exercises its right to accelerate the total debt due because of default. In that situation, 'the entire debt … becomes due when the creditor takes affirmative action to alert the debtor that he has exercised the option to accelerate.'" (citations omitted)); *Arvelo,* 15 So. 3d at 662-63 ("All of that indebtedness had, in fact, become due upon the March 2002 default and the automatic acceleration of the debt as specified in the form installment contract. Upon the occurrence of that event, Park Finance's cause of action for breach of contract had fully accrued, and the five-year statute of limitations began to run.").

Singleton simply has no application to this case.

C. The Dismissal of the First Foreclosure Action Did Not Constitute a Determination that the Lender had No Right to Accelerate and Cannot Result in an Automatic Reinstatement of the Installment Contract's Terms and Obligations.

As noted above, the only way that a note and mortgage can be reinstated following acceleration is if the contractual prerequisites for reinstatement are met or if there is a legal determination that the lender had no right to accelerate the debt in the first place—such as if the mortgagor proves that she was not actually in default. In *Campbell*, 232 So. 2d at 256-57 (Fla. 3d DCA 1970), the Third District listed the situations that would justify a determination that the lender had no right to accelerate, stating:

> [B]ecause of the essentiality of safeguarding the validity of contracts… a contract for acceleration of a mortgage indebtedness should not be abrogated or impaired, or the remedy applicable thereto denied, except upon defensive pleading and proof of facts or circumstances which are regarded in law as sufficient grounds to prompt or support such action by the Court. The decisions disclose that foreclosure on an accelerated basis may be denied **where the right to accelerate has been waived or the mortgagee is estopped to assert it** …; or **where the mortgagee failed to perform some duty upon which the exercise of his right to accelerate was conditioned**; or **where the mortgagor tenders payment of defaulted items**, after the default but before notice of the mortgagee's election to accelerate has been given (by actual notice or by filing suit to foreclose for the full amount of the mortgage indebtedness); or **where there was intent to make timely payment, and it was attempted, or steps taken to accomplish it, but nevertheless the payment was not made due to a misunderstanding or excusable neglect**, coupled with

> some conduct of the mortgagee which in a measure contributed to the failure to pay when due or within the grace period.

Id. at 256-57 (emphasis added). *Accord Singleton*, 882 So. 2d at 1007 ("An adjudication denying acceleration … should not bar a subsequent action a year later" under circumstances where a "mortgagor … prevail[s on] a foreclosure action by demonstrating that she was not in default … or that the mortgagee had waived reliance on the defaults…"). Absent one of these situations, the lender's decision to accelerate the debt stands.[4] *Campbell*, 232 So. 2d at 257 (because that case did not involve one of these factual situations, no deceleration occurred).

---

[4] Absent one of the situations discussed in *Campbell*, there is no basis for concluding that the lender and debtor can or should be "placed back in the same contractual relationship with the same continuing obligations" such as when the debtor defeats a foreclosure action by establishing that he did not, in fact, default on the loan. Even if the lender does not exercise the right to accelerate the debt, the fact that it knows it has the right to do so should, in and of itself, trigger the running of the statute of limitations when the debtor stops making installment payments. In *Brauch v. Bank of America Corp.*, 2005 WL 1027907 (M.D. Fla. 2005), for example, plaintiffs claimed entitlement to periodic payments from the defendant in installments from 1997-1999. The defendant had stopped making payments in January 1998, and no payments were forthcoming thereafter. The plaintiffs did not file suit until late-2003, but sought to avoid the statute of limitations by arguing that the failure to make payment on each installment constituted a separate breach of contract, resulting in the accrual of a new cause of action each time payment was not made. The *Brauch* court disagreed with the plaintiffs' position and held that the claims were barred by the statute of limitations, stating:

> [T]he Court agrees with the Defendant that the Plaintiffs' breach of contract claims are barred by the five-year statute of limitations under Florida law. The Plaintiffs

Federal decisions, such as *Dorta v. Wilmington Trust, N.A.*, 2014 WL 1152917 (M.D. Fla., March 24, 2014), suggesting that dismissal of a foreclosure action for any reason reinstates the installment contract, simply are not consistent with Florida law. To the contrary, as discussed above, the dismissal must be *because* the lender *did not have a right to accelerate* the debt in the initial

---

> claim they were entitled to benefits continuing through December 31, 1999, and that the Defendant continued to deny payments … through that date, less than five years prior to the filing of these claims. The Court finds, however, that in early 1998 (and certainly when the stock awards for 1997 were not paid by the bank), the **Plaintiffs had every reason to realize that no future stock awards would be forthcoming. As such, because there was simply no reason to believe that the bank would pay awards for 1998 and 1999 when it paid none for 1997, the Plaintiffs' breach of contract claims accrued in early 1998** and should have been pursued long before the end of 2003 and 2004. The evidence demonstrates that the claims are accordingly time barred.

Id. at *4 (emphasis added). *See also, Servicios de Almacen Fiscal Zona Franca y Mandatos, S.A. v. Ryder Int'l, Inc.*, 264 Fed. Appx. 878, 880 n.1 (11th Cir. 2008) (rejecting argument that statute of limitations begins to run anew on a contract with continuing obligations "each time [the defendant] contacted another customer without notifying [the plaintiff] in violation of an agreement" and holding that the cause of action accrued on the date of the first breach); *see also Garden Isles Apts. No. 3, Inc. v. Connolly*, 546 So. 2d 38, 41 (Fla. 4th DCA 1989) ("Contrary to appellants' argument that a new cause of action arose each time a new five-year escalation clause became effective, we hold that the cause of action in this case accrued at the time of the first escalation and that the complaint filed in 1986 was well beyond the applicable five-year statute of limitations which commenced in 1975 and 1976.").

foreclosure action for the dismissal to have any effect on when the cause of action accrued for statute of limitations purposes. It makes no sense that a lender that exercises its right to accelerate by way of a letter, but without filing suit, will be barred by the statute of limitations if it proceeds with a foreclosure action five years later but one that does file a foreclosure action and allows it to be dismissed for failure to prosecute, or for some other reason, will not be barred from filing a subsequent foreclosure action five years after the first action. In both cases the debt becomes fully mature upon acceleration; in both cases the debtor loses the right to make payments in installments following acceleration; and in both cases the action to foreclose on the entire debt could have been brought and, therefore, "accrued" at the time that the lender first took steps to inform the debtor that it intended to exercise its right to accelerate the debt.

The Fifth District ignored fundamental principles in granting lenders an exception to the statute of limitations and thereby encouraged dilatory tactics by lenders to the detriment of community associations. The Fifth District's opinion should be reversed.

2. COMMUNITY ASSOCIATIONS WILL BE MATERIALLY PREJUDICED, AND IN EFFECT, EXPERIEINCE AN UNREASONABLE RESTRAINT ON ALIENATION IF THE DECISION BELOW IS UPHELD.

Community associations are non-profit organizations of owners operating together for the common good of the neighborhood under the governance of a

board of directors and recorded constitutions, termed governing documents. Community associations charge owners assessments as a pseudo-tax for the purpose of funding the operations and maintenance obligations of the community at large.

In line with the associations' fiduciary duties owed to owners living within the community, when owners fail to pay their assessments, the associations' remedy against those owners is foreclosure. Before instituting foreclosure against properties of owners delinquent in their assessments to the association, associations conduct a title examination to determine if the property is encumbered by a mortgage to assist the association in effectuating an informed decision as to whether to foreclose upon the association's lien.

In conducting their own foreclosure actions, community associations are limited to take action within the five-year statute of limitations that is delineated in Section 95.11(2)(c), Florida Statutes, which has been adopted by the Legislature and judged as a sufficient amount of time within which to commence a foreclosure action. In fact Section 718.116(6)(a), Florida Statutes, provides that "[t]he association may bring an action in its name to foreclose a lien for assessments in the manner a mortgage of real property is foreclosed." However, the decision below reflects that lenders may be treated differently than associations (and other litigants), in that lenders may be given a re-set of the statute of limitations and

reinstatement of a mortgage, otherwise expired by the statute of limitations, by virtue of nothing more than the dismissal without prejudice of a foreclosure action.

The Fifth District's ruling below presents a disincentive to the associations' remedy of foreclosure, as title to any property associations may acquire would be encumbered by a lender's mortgage lien. The affirmation of the lower court's decision would not only hamper associations' ability to make informed business decisions as to whether to foreclose upon properties where owners are delinquent in assessments, but would also present a barrier to associations that take title to properties within their communities through foreclosure.

If an association decides to foreclose upon a property, then the liability of operating and maintaining properties would be imposed upon community association leaders who are well-versed in the business of governance, but not in the business of being a landlord. It is unlikely that an association would be able to sell a property to a third-party buyer with the encumbrance of a lender's lien remaining on the property. Further, associations that decide to lease property for some unpredictable period of time, until the lender decides to foreclose upon same, would be treated as landlords and would be liable for the maintenance, upkeep, improvements, insurance, and assessments related to such property. Notably, some associations would not even have the opportunity to lease such properties, as associations' interests in property within their communities depends largely upon

the provisions relating to same within their governing documents. Many associations' governing documents restrict, and even prevent, leasing, which, in the case at hand, would leave those associations with no real interest or ability to alienate such property while the lender sits on its rights. *See Kroop v. Carvelle Condominium, Inc.*, 323 So. 2d 307 (Fla. 3d DCA 1975) (upholding a clause in the association's governing documents that restricted leasing to not more than once during the period of ownership as a reasonable regulation).

Because equity follows the law, it cannot be invoked to grant an exception to the statute of limitations. *U.S. Bank Nat. Ass'n v. Tadmore*, 23 So. 3d 822, 823 (Fla. 3d DCA 2009) citing *Davis v. Starling,* 799 So. 2d 373, 378 (Fla. 4th DCA 2001) (noting that "equity follows the law and cannot be used to eliminate its established rules"); *Laws v. Laws,* 364 So. 2d 798, 801 (Fla. 4th DCA 1978) ("It is apparent that the trial court was attempting to do 'equity' in the case, but in that quest for 'equity', the legal rights of the respective parties cannot be trammeled."); *see also Nordberg v. Green,* 638 So. 2d 91, 93 (Fla. 3d DCA 1994) ("[C]ourts of equity have [no] right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law.") (quoting *Flagler v. Flagler,* 94 So. 2d 592, 594 (Fla. 1957)). The only inequitable result would be to

grant an exception to the statute of limitations solely for lenders when the statute applies to all other litigants.

CONCLUSION

For the foregoing reasons, the Fifth District's decision should be reversed and the summary judgment entered by the Seventh Judicial Circuit Court in favor of Petitioner Bartram on his cross-claim against Respondent U.S. Bank, N.A. should be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief, on behalf of Petitioners, was served via electronic mail, this 17th day of November, 2014, upon all counsel on the attached Service List.

By: /s/ Steven M. Siegfried, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: /s/ Steven M. Siegfried, Esq.